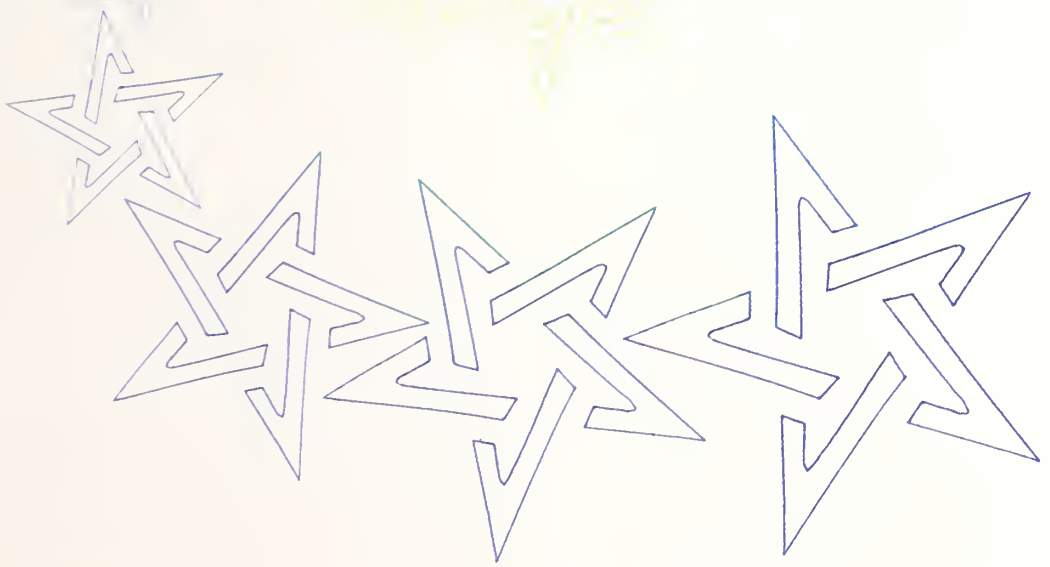
Sourcebook on the

AMERICANS WITH DISABILITIES ACT



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...promoting employment of people with disabilities

A Sourcebook on the Americans with Disabilities Act

Compiled and edited by David Cameron and Trudy F. Sharp

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Table of Contents

Introduction

The ADA Quarterly's greatest hits

By David Cameron, ADA coordinator, and Trudy Sharp, public information officer

In the summer of 1993 the Americans with Disabilities Act of 1990 (ADA) was in its infancy. Though on the books, many of its more significant parts were yet to come into effect, so its overall impact on our society was largely unknown. Out of that uncertainty, the Ohio Rehabilitation Services Commission created the "ADA Quarterly" and began inserting it into several issues a year of our *NewsNet* magazine. More than 150 articles about various aspects of the ADA have appeared in 14-plus issues. Good info but a bit unwieldy.

Thus is born *A Sourcebook on the Americans with Disabilities Act*. Containing a compilation of ADA articles from RSC publications, it's intended as a "greatest hits" edition. Or to continue the musical analogy, a "best of" the Quarterly's issues, plus a few unreleased tracks. Articles have been reorganized by subject and indexed to make it easier to find just what you need. (After all, we're committed to accessibility.)

RSC's ADA Quarterly issues have all been collections of the best and most pertinent information that was available at the time of publication. None of them attempted to be comprehensive on any subject. Same for this book. You will notice that the first chapter, Title I: Employment, is significantly dominant. Do not take this as an unintended judgment on the relative importance of one portion of the ADA over another. It is merely a reflection of RSC's own purpose: to promote the employment of people with disabilities. RSC has no power to enforce compliance with the ADA – that power exists only through the U.S. Equal Employment Opportunity Commission (Title I), the U.S. Department of Justice (Titles II and III) and, of course, the court system.

You needn't be an ADA expert, a disability expert or a lawyer to utilize this book. We attempt to educate, not to provide legal advice. In fact, we have included some articles that are philosophical in nature – attempts to explain what having a disability means in this society and why the law is necessary to protect *our* civil rights. Yes, the ADA collectively protects *all of us*. There are 49 million people with disabilities in America and any one of us could join this population "in the blink of an eye," as the article on page 32 states. As for societal benefits, people with disabilities work and pay taxes and contribute to the diversity of our communities. The cost of rehabilitating someone and helping that person find a job is far less than the price of public support.

Our desire in producing this sourcebook on the ADA is to assuage any fears that employers and communities may have about the act – to let them know they can get answers to their questions and those answers can often be simple and inexpensive. We also hope that people with disabilities will use this book to understand their rights and exercise their opportunities for independence. This publication is only one of many resources that are readily available in print, on video, over the phone or in person from people who are well-versed in the particulars of the ADA and disability issues. We have included contact information for many of them throughout these pages.

If you still have questions after reviewing this material, Dave Cameron will be happy to take your calls. Call toll-free in Ohio (800) 282-4536 voice/TTY and ask for ext. 1232 voice or ext. 1470 TTY. Outside Ohio and in Columbus, call (614) 438-1232 voice or (614) 438-1470 TTY.

Title I:
Employment

EMPLOYMENT *TITLE I* HIGHLIGHTS

What is the ADA?

The Americans with Disabilities Act *is* an equal opportunity, civil rights law. It *is not* an employment preference law.

Who is protected?

Any person who has an impairment that substantially limits a major life activity (or has a record of such an impairment or is regarded as having such an impairment); in addition, the person must be otherwise qualified for a job and must be able to perform the essential functions of a job.

Who must comply?

The ADA applies to all private employers with 15 or more employees and to all public employers regardless of size.

What is required?

Employers:

- may not discriminate against a person with a disability in any terms of employment.
- cannot ask about an applicant's health or disability (but can ask about his or her ability to perform a job).
- must try to provide reasonable accommodation when needed to allow a person with a disability to apply for or perform in a job.

What is not required?

Employers are not required to:

- give preference to persons with disabilities.
- provide a reasonable accommodation that will cause an undue hardship on an organization.
- hire or keep a person who is not able to perform the job.
- hire or keep a person whose disability would cause a direct threat to the health or safety of the individual or to coworkers.

What is a reasonable accommodation?

It is any modification to a job – including to a job site, the working conditions, the manner in which a job is performed, or even the hours – that will permit a person with a disability to do that job.

What is an undue hardship?

It is any accommodation that would be unduly expensive or disruptive or that would fundamentally alter the nature or operation of a business.

Who is Covered?

Much as we might like to avoid all the intricacies of law, it's the details that make it work. This article looks at the details of the definitions of *employer*, *disability* and *qualified person with a disability*.

Who is an employer?

The definition of employer includes "agents" of the employer, such as managers, supervisors, foremen or others who act for the employer, such as agencies used to conduct background checks on candidates. Therefore, the employer is responsible for actions of such parties that may violate the law.

Which employers does ADA affect?

- private employers with 15 employees or more – *this means 15 or more employees (including part-time) working 20 or more calendar weeks in the current (or preceding) calendar year*
- state and local government
- employment agencies
- labor unions
- joint labor-management committees
- churches – a *church can require employees to be members of the faith*
- U.S. Congress

Which employers are exempt?

- federal government agencies – *they are covered by equivalent provisions of the Rehabilitation Act of 1973*
- corporations wholly owned by the federal government – *they are covered by equivalent provisions of the Rehabilitation Act of 1973*
- Native American tribes
- private membership clubs *if they are tax-exempt under Section 501(c) of Internal Revenue Code and not a labor organization*

Who is an employee?

The law specifies that an "employee" is an individual who is employed by an employer. This is not, despite appearances, a smart-aleck definition that tells us nothing. In fact, it tells us that the law includes almost everyone who is in an employment relationship. It even includes U.S. citizens who work for American companies, their subsidiaries, or firms controlled by Americans outside the United States. However, the law contains an exemption for any action to comply with the ADA that would violate the law of a foreign country where a workplace is located.

How is disability defined?

The ADA definition of disability is unlike definitions for workers' compensation, vocational rehabilitation, disabled veterans and the like. That is because it is more about discrimination than about disability. Accordingly, a person with a disability is someone who fits into any of these categories:

- has a physical or mental impairment that substantially limits one or more major life activity;
- has a record of such an impairment; OR
- is regarded as having such an impairment.

Physical or mental impairment

This is the obvious part, the one we expect. *Physical* impairment means any "physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more" body systems. *Mental* impairment means "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." There is no exhaustive list of diseases or conditions that are defined as disabilities.

Examples of *major life activities* are walking, hearing, caring for oneself and working. There is no definitive list of major life activities.

A person is considered *substantially limited* if he or she is unable to perform or is significantly limited in the ability to perform a major life activity when compared to an average person in the general population.

A person is considered to have a disability regardless of whether he or she takes medication or uses an assistive device that alleviates the condition's effect.

EXAMPLE: A person whose seizure disorder is controlled by medication or a person who uses a prosthetic leg will be protected from employment discrimination even if the effect of the impairment is greatly reduced.

Record of impairment

This applies to a person who has had, for example, cancer that is cured, controlled or in remission. This category also includes people with a history of mental illness and people who were misclassified or misdiagnosed as having a disability. Even if there is no current effect caused by the former condition, a person with a history of disability is protected from any discriminatory employment action.

EXAMPLE: A woman had colon cancer with subsequent surgical resection in 1975 and has had no recurrence; she has no residuals from the experience and thus no impairment whatsoever. She is protected from employment discrimination.

Regarded as having a disability

This part addresses society's myths and stereotypes about disability. It recognizes that attitudes about disability have the potential to be as handicapping as the limitations that result from actual impairments. It extends the protection of the law to those people who have no

impairment but are treated as though they do.

EXAMPLE: A man sustained serious burns in an auto accident; although he has completely recovered, he still bears significant facial scars. He is protected from employment discrimination.

Exceptions

Regardless of what you may think about any of the following conditions, they are, by definition, not considered disabilities for the purposes of the ADA:

- current illegal use of drugs;
- homosexuality, bisexuality;
- transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments;
- other sexual behavior disorders;
- compulsive gambling, kleptomania, pyromania; and
- psychoactive substance use disorders resulting from current illegal use of drugs.

Temporary conditions

Temporary, non-chronic impairments that last for a short time and have little or no long-term impact usually are not disabilities.

EXAMPLES: Broken limbs, sprains, concussions, appendicitis, pregnancy, common colds or flu ordinarily would not be disabilities.

Who is a qualified person?

Contrary to common misunderstanding, there is more to ADA protection than having a disability. The ADA is not an employment law nor does it give preference to people with disabilities. These two additional criteria also must be met for the ADA to apply:

- the person meets the employer's qualifications; and
- can perform the essential functions of the job.

Qualifications

The employer decides what qualifications are necessary for a job, including skills, experience, education, certifications, licenses and any other job-related requirements. A person with a disability must possess these qualifications for the ADA to apply.

Performance

Each job has "essential functions," which are its core duties and the reason the job exists, as well as "marginal functions." This latter criterion is about a person's ability to actually perform the essential ones, in the language of the law, either "with or without" accommodation. Determining this may require a two-step assessment: Can the person perform the essential functions without an accommodation? If not, can the person perform them with an accommodation? In other words, the fact that an individual needs an accommodation cannot be a reason for determining that the person is not qualified.

The Equal Employment Opportunity Commission, which enforces the employment portion of the ADA, has stated that when a person files a complaint about employment discrimination it will make the following assessments in this order:

1. Does the person have a disability?
2. Is the person qualified?
3. Can the person perform the job?

If the answer to any of these questions is no, then ADA protection does not apply and the investigation stops.

– D.C.

In the courts

ADA is not retroactive

The ADA was not intended to be applied retroactively, the U.S. District Court for Kansas has ruled. In *Aramburu v. The Boeing Company,* Santiago Aramburu, who was dismissed by Boeing on Jan. 29, 1992, sued under Title I, claiming that the company had fired him due to his work-related carpal tunnel syndrome in violation of the ADA. However, the company argued that the ADA does not apply retroactively to employment actions that took place before July 26, 1992, the law's effective date.

While Aramburu claimed that his ADA complaint should be considered because he received his "right to sue" letter from the U.S. Equal Employment Opportunity Commission after July 26, 1992, the court agreed with Boeing that the ADA "is a substantive statute, not a remedial one" and granted summary judgment to the company. The court ruled that an ADA claim could only arise for Aramburu if he re-applied for a job at Boeing and was not hired due to his disability.

ADA Compliance Guide © 1994

No ADA disability – woman could perform various jobs

A telephone service representative's migraine headaches were not a disability under the ADA, ruled a federal district court in Mississippi. In *Barfield v. Bell South Telecommunications, Inc.*, a woman with migraine headaches alleged that she was discharged from employment in violation of the ADA. The court decided that the employee did not have a disability under the ADA because she did not show that the headaches prevented her from performing a class of jobs or a broad range of jobs in various classes, and she did not otherwise show that the headaches substantially limited at least one major life activity. Additionally, the employee's excessive absenteeism rendered her unqualified to perform the essential functions of the job.

Disability Compliance Bulletin © 1995

Diagnosis doesn't = disability

The Americans with Disabilities Act has been the law of the land for six years now. It's not just a passing fashion. It's here to stay, and it is making a difference. Persistent myths, however, are causing problems – number one among them being "diagnosis equals disability."

A corollary to this myth is the equally irrelevant question: "Is (fill in the blank) a disability?" Over and over the query is made by employers, service providers and individuals with disabilities. Is diabetes a disability? Is cancer a disability? Is obesity a disability?

And the answer is always the same: maybe. The definition of disability for ADA purposes is based on *function, not diagnosis*. Here, direct from the EEOC's Technical Assistance Manual for Title I, is the first part of the official definition:

> *An individual with a disability is a person who has a physical or mental impairment that* ***substantially limits*** *one or more major life activities* [emphasis added].

This qualifier is necessary because we all have diagnoses. I have an impairment, albeit a rather typical one, commonly known as myopia. (I refer to visual, not psychological, shortsightedness.) Eyeglasses provide such nearly perfect correction that no one, including me, ever perceives me as having a visual disability. Similarly, the ADA is concerned with the effect of a person's impairment and not the impairment itself.

Nationally-syndicated columnist George Will, who has a child with a disability, based an entire article based on the misconception that diagnosis equals disability.

Will's erroneous editorial concentrated particularly on character and/or personality disorders as they are defined in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. He pointed out – quite correctly in this instance – that numerous people manifest at one time or another the traits associated with various disorders, such as oppositional defiant disorder (often loses temper, often deliberately annoys people) or narcissistic personality disorder (boastful and pretentious, may assume that they do not have to wait in line) or obsessive-compulsive personality disorder (preoccupation with orderliness, mercilessly self-critical). He went on at great length in this way.

Do these people sound familiar? Do you encounter them on the highway? Do they occupy the offices around you? Do you recognize some of these characteristics in *yourself*? Probably, but the point that Will missed entirely is that simply exhibiting a behavior or even receiving an official diagnosis does not make someone a *person with a disability* under the law. As a society, we cannot afford to perpetuate this mistaken assumption.

Again quoting directly from the EEOC:

> *An impairment is only a "disability" under the ADA if it substantially limits one or more major life activities. An individual must be unable to perform, or be significantly limited in the ability to perform, an activity compared to an average person in the general population.*

Walking is one example of a "major life activity" that an average person can perform with little or no difficulty. (See "How is disability defined?" on page 5.)

EEOC offers these three factors to consider in assessing whether an impairment is substantially limiting:

- its nature and severity;
- how long it will last or is expected to last; and
- its permanent or long-term impact, or expected impact.

Nature and severity

Some impairments, such as blindness, deafness, HIV infection or AIDS, are by their nature substantially limiting; however, many other impairments may be disabling for some individuals but not for others, depending on the impact on their activities.

> ***The definition of disability for ADA purposes is based on function.... Simply exhibiting a behavior or even receiving an official diagnosis does not make someone a person with a disability under the law.***

EXAMPLE: Cerebral palsy often significantly interferes with speaking, walking, and performing manual tasks. However, a person with very mild cerebral palsy which only slightly affects speech but has no impact on other major life activities is not considered to have a disability.

Temporary impairments

Non-chronic conditions that last only a few days or weeks and have little or no long-term impact usually are not disabilities. Examples of such transitory conditions are influenza, appendicitis and most broken bones. The mere fact that an individual may have required absolute bed rest or hospitalization for such a condition does not alter the transitory nature of the condition. Even the necessity of surgery, without more, is not sufficient to raise a short-term condition to the level of a disability.

Some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities.

EXAMPLE: An employee who had a temporary illness that required exploratory surgery but was expected to recover completely in six to eight weeks did not have an impairment that substantially limited major life activities.

EXAMPLE: A broken leg that heals normally within a

few months would not be a disability. But if the healing took significantly longer than normal and the person could not walk, he or she would be considered to have a disability during this period. Likewise a fracture that does not heal properly can result in a permanent, significant restriction in walking that might constitute a disability.

Individual impact

The determination of substantial limitation must always be made with respect to an impairment's effect on a specific person.

EXAMPLE: One person had worked as a receptionist-clerk and sustained a back injury that resulted in considerable pain. The pain permanently restricted her ability to walk, sit, stand, drive, care for her home and engage in recreational activities. Another person had worked as a general laborer and suffered a similar back injury, but was able to continue an active life, including recreational sports, and had obtained a new position as a security guard. The first person was found by a court to have a disability; however, a court determined that the second person was not significantly restricted in any major life activity and thus did not have a disability.

Combined impairments

A person may have two or more minor impairments which, when considered together, result in substantial limitation.

EXAMPLE: A woman has mild arthritis in her wrists and hands and mild osteoporosis, neither of which substantially limits a major life activity. In combination, however, these impairments significantly restrict her ability to lift and to perform manual tasks. She has a disability under the ADA.

You may have observed that all these examples (taken from EEOC's Technical Assistance Manual) are about physical impairments, not mental. Could the EEOC be as uncertain about mental impairments as society in general? Maybe so, but we can say with certainty that the ADA principles developed by the EEOC and quoted here *apply equally* to mental impairments.

Thus, in the interview room or at the work site, this is the question that needs to be addressed: Does a person's impairment significantly interfere with the ability to function? If it does, then the person probably has a disability and is entitled to the protection and benefits of the ADA. But let us not be confused about this. Not everything that can be labeled automatically becomes a disability. In the same way that no one would regard me as having a visual disability, neither would anyone regard my occasional bouts with paranoia as a disability. (Would they?) – D.C.

Small employer covered because of consolidation with other firm

Even a firm with fewer than 15 employees can be a covered entity under the ADA as shown in the case of an attorney with AIDS who sued the owner of a law firm that fired him.

Martin M. Krimsky, attorney for plaintiff "John Doe," said defendant William Shapiro fired Doe just 10 days after Doe told him that he had AIDS. Doe was given no advance notice of the firing and no severance pay.

An interesting issue was raised when U.S. District Court Judge Robert S. Gawthrop III denied Shapiro's motion to dismiss. Shapiro contended that his suburban Philadelphia law firm employed no more than 10 people and therefore was not covered by the ADA.

Plaintiff Doe, however, successfully argued that the firm was covered because it could be consolidated with an equipment-leasing firm for which it does most of its legal work. The leasing firm, also owned by Shapiro, operated in the same building and was separated from the law firm only by filing cabinets, Krimsky said. Court records showed that the leasing firm and a related securities firm maintained separate payroll, records, books, bank accounts and filed separate tax returns. The court held, however, that "although the defendants contend that each defendant is engaged in a separate industry affecting commerce, it is more accurate to state that each contributes something to a single, common enterprise..."

Citing *Beckwith v. International Mill Servs.*, Gawthrop used a four-step test to determine whether the law firm was a separate entity or part of an integrated enterprise: 1) the interrelation of operations; 2) common management; 3) centralized control of labor relations; and 4) common ownership or financial control existing among the several entities.

Gawthrop said the integrated nature of the operation was illustrated in a phone listing for the leasing company that showed the Shapiro law firm attorneys under the heading of "legal department." At least 90 percent of the cases handled by the Shapiro law firm were on behalf of the leasing company.

The case does not set a judicial precedent because it was settled prior to trial.

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In the courts

Employment agency sued by woman who didn't fit 'profile'

An employment agency was sued because its owner allegedly refused to refer a woman for a prestigious secretarial position – reportedly because the woman, who stutters, did not fit the agency's 'profile' for job candidates. The suit, which was filed by the Equal Employment Opportunity Commission (EEOC), raises two interesting points:

First, employment agencies are covered under ADA's Title I even though they technically are not employers – and the persons they place are technically not their employees. Title I prohibits discrimination by covered entities, not just employers. Employment agencies are covered entities.

Second, even though the suit says that complainant Patricia S. Carter's stuttering does *not* constitute a disability, EEOC said the employment agency nevertheless discriminated against her because it *perceived* her speech impediment to substantially limit the ability to communicate and perform the essential functions of a secretarial position.

The EEOC alleges these facts of the case: Carter went to Hopkins-Lull in October 1992 to enlist its help in finding a clerical position. Carter, who has worked in other clerical positions for several large companies and law firms in the Baltimore area, was interviewed and given a typing test by a Hopkins-Lull recruiter. Carter was found to be "highly qualified" for placement at a local investment company. However, the owner of the employment agency interviewed Carter and then refused to refer her for the job, reportedly stating that Carter did not communicate effectively and did not fit the profile of candidates that she wanted representing the employment agency, according to EEOC. The suit filed May 1995 asked the court to order Hopkins-Lull to pay back wages to Carter, who found a job within three months after leaving the agency.

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U.S. companies abroad

An inquirer wrote to the Equal Employment Opportunity Commission to ask whether the ADA applies to a subsidiary of AT&T that is located in the United Kingdom. The Department of Justice wrote that Title I applies in certain circumstances to United States companies doing business overseas. Generally, Title I applies to U.S. citizens working for U.S. companies abroad.

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Local placement staff may be the resource for you

by Janet Kohn, employer services coordinator, RSC

Do all businesses need Braille applications to make their employment process accessible for people with disabilities? The answer is no. There are many more effective and less expensive methods that can be used. Business people need a good resource for answers to the many ADA questions such as this, and vocational rehabilitation placement staff can be that resource.

Placement professionals assist people with disabilities to locate employment in line with their abilities and interests. To prepare this column, I spoke with placement staff from around Ohio to identify the critical pieces of ADA information they think business people should know. Their input gravitated to seven key points.

1) Recruitment – At times employers ask if we can send an applicant with a specific type of disability because they believe that person could do the job. What they are struggling with is the correct way, politically and legally, to recruit a person with a disability for a specific job. Our task is to inform business people that what they want is a person with the appropriate skills. A person's disability (or gender or race) should not be the qualifying attribute for the job.

2) Interviewing – Placement professionals can ease an employer's fear by identifying potentially illegal questions and addressing concerns about making the interview process accessible. While we cannot give an employer the name of the applicant's disability, we can talk about any functional limitations and the possible accommodations to overcome any work-related barriers. This is the information an employer needs to evaluate whether a person has the necessary skills, education and experience.

An employer once told me that he would never use a sign language interpreter in a job interview because, if he could not communicate effectively one-on-one, he could never supervise the person. He explained that he was just using common sense.

This employer had never communicated with anyone through a sign language interpreter and thus had no experience to draw upon. Common sense is achieved by gathering current, accurate information and applying your similar experiences to a situation. He told me the purpose of the interview was for applicants to showcase their qualifications and for the employer to resolve concerns. Eventually, he agreed it would be reasonable to use an interpreter so the person could explain how he or she could do the job and he could resolve any concerns about the applicant's experience and education.

3) Reasonable accommodation – It seems to be the nature of employers to imagine big money and major workplace disruption when thinking about accommodating employees with disabilities, but that is not the reality. The ADA is built on the principle of effectively accommo-

dating one person in a specific job. A placement professional can help make this happen. Under the ADA the *employer* makes the final decision about which effective accommodation is provided.

4) Employee responsibility – Accommodation starts with the individual's request. Employees are responsible for making their needs known.

5) Employer responsbility – Employers are responsible for seeking input. The employment provisions of the ADA require that the person with a disability must ask for accommodation and then be involved in the process to identify what would work most effectively.

Problems can result when the two above steps are missed. For example, an employer once padded the walls of the cubical of an employee with a seizure disorder in order to protect him. The employer *perceived* a problem and acted on what he thought was common sense. The individual with the disability had never asked for the accommodation and had not been consulted about the "solution." When all key players do not participate in the solution it can be a very costly and useless accommodation.

6) Essential functions – Employers need to look at the essence of a job (called the *essential functions* in ADA language) and then talk with the employee about how the tasks can be accomplished. We frequently find that only minor adjustments are necessary.

A supervisor once told me that he would never hire an attorney who used a wheelchair because that person could not get law books off the top shelf. The essential function of the job, however, was *processing* the information not *reaching* the books.

7) Getting help – Some accommodations cost money and employers need to know the sources for financial help. For example, the Disabled Access Credit (see *page 13*) can assist small businesses with expenses such as sign language interpreters. Some creative larger companies are setting up special funds to cover the accommodation costs so that the burden does not fall to individual departments.

For answers to your ADA-related employment questions, call your local RSC office or local community rehabilitation program. The placement staff of these organizations may provide the knowledgeable resource you need. But first, start with a "we can do it" attitude.

DOs and DON'Ts:

do

- Ask a person with a disability about his or her qualifications and ability to do a job.
- Try to make a reasonable accommodation to enable a person with a disability to do a job.
- Before deciding how to accommodate an employee with a disability, consult that person.
- Keep all medical and psychological information strictly confidential.
- Demand that employees with disabilities meet the same performance standards and workplace behaviors as any other employees.
- Give a person with a disability the same opportunity to compete for a job as you give to other people.

don't

- Give preferential treatment to a person with a disability.
- Ask an applicant any question that is likely to elicit information about a disability.
- Use tests or other selection processes that screen out people with disabilities.
- Require an applicant to take a medical exam before making a job offer.
- Hire or keep a person with a disability who is not qualified to do the job.
- Hire or keep a person whose disability would cause a direct threat to the health and safety of the individual or of co-workers.
- Make an accommodation that will be an undue hardship.

Increasing Company Profit

People with disabilities represent the greatest untapped labor pool

By Jasen M. Walker, Ed.D., C.R.C., and Fred Heffner, Ed.D.

As disability management consultants to business and industry, our experience over the last two years has been that company officials too frequently view the Americans with Disabilities Act as another piece of social legislation designed to get in the way of company profit. From that perspective, compliance with the ADA becomes an effort to "dodge the bullet" or to do what is necessary to avoid litigation. With regard to the latter position, we often hear company managers say, "Well, we want to see how the courts are going to decide on the vague language in the act." This implies that those managers will not pursue full compliance until lawsuits and court decisions further refine ADA language, but ignores the fact that much of the ADA is already based on legally defined and redefined language.

We try to make those managers aware that there are already nearly 20 years of legal precedents in disability discrimination cases, generally stemming from violations or the Rehabilitation Act of 1973. But, more important, we attempt to make those managers aware of success stories from companies that have embraced ADA concepts as opportunities to profit by hiring the best qualified people and managing the cost of workplace disability.

We offer Title I of the Americans with Disabilities Act as a means by which organizations can select qualified individuals willing to work and as a model for reducing disability expenditures. Over the past 10 years, we have found that application of ADA principles like "reasonable accommodation" actually saves companies money. Therefore, we now urge that company officials view ADA concepts as tools to increase profit by saving on the costs associated with finding, hiring and maintaining qualified employees, and by reducing expenditures associated with workplace disability. Of course, we believe that those well-managed organizations which pursue application of ADA concepts also lower the probability that they will be defendants in potentially expensive federal litigation.

Qualified applicants who will work

Robert B. Reich, U.S. Secretary of Labor, has encouraged management and labor to make the necessary adjustments to train and retrain the most highly motivated people in our country. Such adjustments would include hiring one of the best educated and most highly trained minority groups in the U.S., persons with disabilities.

It has been our experience that the vast majority of people with disabilities, representing this country's greatest labor pool, are willing to work when provided the opportunity. Nearly every human resource manager tells us that the pool of "qualified" applicants is evaporating. By qualified, those company officials inevitably mean attitudinally as much as aptitudinally. Personnel offices increasingly hear supervisors complain that newly hired employees are unrealistic in terms of initial salary expectations, jaded by prior work experience or just plain difficult. The offices of human resource managers are visited by employees who charge supervisors with being overly demanding, unfair, and in some cases, assaulting.

It has been estimated that one in five Americans has a disability, and as the workforce ages, this percentage will increase so that Americans with disabilities will no doubt become the largest "minority" group. We must turn to this so-called minority to find people who are willing to work, not simply aptitudinally qualified to fill a role. Training and maintaining those willing to work increases an organization's profitability.

> *...the use of wage replacement benefits tends to go down in companies that see the ADA as a model for proactively managing workplace disability.*

Nowhere is the typical company spending money faster than in the area of disability. Studies have shown that the average company spends eight percent of payroll on direct and indirect disability costs. Workers' compensation and long-term disability insurance carriers are rapidly increasing premiums. Some companies have found that their workers' compensation costs alone are their highest line item next to payroll.

Progressive, well-managed organizations are using the ADA as a model for designing and implementing disability management programs. Those companies realize that current workers are valuable. Allowing these employees to "disappear" after the onset of an occupationally significant injury or illness makes no economic sense. We know that companies can reduce disability expenditures and maintain workers by providing reasonable accommodation. We have seen companies use essential-function job descriptions not only as a method to qualify and accommodate a new hire with a disability, but also as a risk management tool to assist a physician, an employee and a supervisor to generate ideas on how a return-to-work plan might be executed. Companies doing this are saving between $8 and $10 for every $1 invested.

We have also seen that a modification of jobs has produced safer and more efficient ways to work. For example, there has been a tremendous reduction in the number of incidents of repetitive use syndromes by

Survey says...

Corporate acceptance exists

A survey of America's corporate employers shows that 70 percent said the Americans with Disabilities Act should not be changed. Marking the fifth anniversary of the ADA, the National Organization on Disability (NOD) released the findings of the survey conducted by Louis Harris & Associates Inc.

Employers have better attitudes about employing people with disabilities now than they did in 1986, when Harris conducted an earlier survey. The percentage of companies that say accommodations have been made in the workplace has increased from 51 percent in 1986 to 81 percent in 1995. The percentage of corporate employers with policies and programs for hiring people with disabilities has increased from 46 percent to 56 percent. However, the survey showed only a slight increase in the percentage of companies that have hired people with disabilities from 62 percent to 64 percent.

"This research refutes two myths about the ADA," said Humphrey Taylor, chair and CEO of Louis Harris. "The first myth is that corporate America is not supportive of the ADA. The overwhelming majority of senior corporate executives strongly supports the ADA and does not favor weakening it in any way.

"The second myth is that many companies have incurred heavy additional costs or have been badly mired in litigation because of the ADA. This is only true of a very small fraction of employers."

The survey also found:

- 79 percent of employers said employment of people with disabilities would be a "boost to the nation."
- 76 percent of corporate managers view the job performance of employees with disabilities as pretty good and 17 percent as excellent. Only three percent rated the performance as merely fair.
- 27 percent of companies say the average cost of employing a person with a disability is greater than employing a person without a disability. The median cost per employee for accommodation was $223.

For copies of the report, contact: NOD, 910 16th St. NW, Washington, DC 20006; (202) 293-5960 voice, (202) 293-5968 TTY.

Report on Disability Programs © 1995

adapting keyboard designs that were once created for people with neuromuscular disorders.

Finally, when companies are proactively managing disability, employees come to believe the message that they are too valuable to waste, and the company is too committed to both survival and profitability to be held as a disability benefit hostage. Thus, the use of wage replacement benefits tends to go down in companies that see the ADA as a model for proactively managing workplace disability.

In conclusion, we are encouraged by what we see. Unlike some observers, we do not think that the particular number of EEOC complaints will necessarily be a reflection of how well companies are complying with the ADA. We may need to wait another 20 years to fully realize the true power of a law designed to protect qualified people who just happen to be physically or mentally different from the majority of those who maintain the profit margins in their companies. Americans with disabilities, including those injured or ill while at work, are usually interested in being productive and helping an organization grow. We have learned that through developing ADA awareness and tapping into the power of individuals with disabilities, well-managed companies have become more viable and profitable. Understanding the ADA and the potential it holds for all current and prospective workers, as well as employers, has become a vehicle of profit for the progressive and well-managed American work organization.

In The Mainstream, Jan./Feb. © 1994

Ohio group can take your calls

Shortly after passage of the ADA, the National Institute on Disability and Rehabilitation Research established 10 regional information resources across the nation known as "Disability and Business Technical Assistance Centers." The center serving Ohio is located at the University of Illinois in Chicago. However, a "branch office" is located in Columbus. The ADA-OHIO office disseminates information and provides technical assistance about the ADA. The project's Steering Committee members come from many different public and private organizations, all having an interest in the ADA. They and the office staff provide telephone technical assistance, printed resource materials and educational workshops to business, government, human service providers and individuals.

Call (800) ADA-OHIO

(800) ADA-ADA1 TTY

or e-mail: **ada-ohio@ix.netcom.com**

Tax Incentives

Tax incentives are available to help businesses cover the costs of making access improvements or encourage hiring of people with disabilities. They are not part of the ADA, nevertheless, their potential value to businesses makes them inseparable from the ADA's purposes.

Small business tax credit

(IRS Code Section 44)

The Disabled Access Credit is available for small businesses that for the previous tax year had at least one of the following: $1 million or less in revenue OR 30 or fewer full-time employees.

The credit (subtracted from total tax liability after calculating taxes) is available every year and can be used toward a variety of costs, including: sign language interpreters (for customers or employees with hearing impairments), readers (for customers or employees with visual impairments), purchase of adaptive equipment, producing print materials in alternate formats (Braille, audio tape, etc.), removing architectural barriers in buildings or vehicles, and fees for consulting services (under certain circumstances). The credit does *not* apply to the costs of new construction. It is used only for adaptations to existing facilities that are required to comply with the ADA.

The business earns 50 percent of expenditures up to a maximum of $10,000, for a maximum benefit of $5,000. This is available every year. There is no credit for the first $250 nor for expenses beyond $10,250. For example:

Item	Cost	Credit	Net Cost
Interior signs	$200	none	$200
Ramp, widened front door	$7,250	$3,500	$3,750
Restrooms	$12,750	$5,000	$7,750

Barrier removal deduction

(IRS Code Section 190)

Businesses of any size (including active ownership of an apartment building) are eligible for a maximum deduction of $15,000 per year to cover the expense of removing architectural barriers in buildings or transportation barriers in vehicles. The amount spent is subtracted from the business' total income, before taxes, to establish taxable income. To be eligible, any renovations must be done in compliance with the applicable accessibility standards.

Combining the two tax incentives

Small businesses can use the credit and the deduction together if the expenses incurred qualify under both Section 44 and Section 190. For instance, if a business spent $12,000 for access adaptations, it could qualify for a $5,000 tax credit and a $7,000 tax deduction.

Both the credit and the deduction can be used every year, but there are limitations. If a business spends more than can be claimed in one year, it is not permitted to carry over those expenses and thus claim a tax benefit in the next year as well. For example, if access expenses total $13,250 in 1996, the business qualifies for a tax credit of $5,000 because it spent $10,250-plus; but it cannot carry over the additional $3,000 in order to claim a credit for 1997. Only expenses incurred in 1997 will qualify for a credit in 1997.

However, if the credit a business is entitled to exceeds the amount of taxes owed, it may carry forward the unused portion of the credit to the following year.

– D.C.

Adapted from "Fact Sheet #4 – Tax Incentives for Improving Accessibility" by Adaptive Environments Center, Inc., and the IRS booklets listed below.

Targeted tax credit available

The federal Targeted Jobs Tax Credit program which ended in late 1994 has been replaced by the Work Opportunities Tax Credit (WOTC). The new program gives employers a tax credit for hiring people with disabilities who are or have been clients of the Ohio Rehabilitation Services Commission (or any state's vocational rehabilitation agency) or the Department of Veterans Affairs.

Workers must be retained for 180 days or 400 hours befoer a credit can be taken. Credit against federal tax liability is 35 percent of the eligible employee's first $6,000 in wages, for a maximum credit per worker of $2,100. For summer youth, employers may claim a credit of 35 percent of the first 90 days wages up to $3,000, for a maximum credit of $1,050.

The job applicant must complete IRS Form 8850 on or before the day a job offer is made. If the employer believes the applicant is a member of a targeted group, the employer completes the rest of the form no later than the day the job offer is made. Both the job applicant and employer must sign and submit the form directly to the Ohio Bureau of Employment Services, 145 S. Front St., P.O. Box 1618, Columbus, OH 43216-1618. Attn.: WOTC Unit. The form must be mailed and postmarked within 21 days of the start-to-work date.

resources

For IRS publications, call (800) 829-3676

#907 – *Tax Highlights for Persons with Disabilities* (general)

#535 – *Business Expenses* (architectural/transportation tax deduction)

#334 – *Tax Guide for Small Business* (small business tax credit)

Federal incentives encourage hiring of people with retardation

By Gale R. Gross, director of Disabilities Organizational Development Services, Columbus

Fashionable television shows have highlighted individuals with diverse disabilities who are productively employed. From a mayor who is deaf to a law office clerk with mental retardation and an active high school student with Down syndrome, fictional characters have personified what the ADA defines as a "qualified employee with a disability" – an individual who, with or without reasonable accommodation, can do the essential functions of the job and meets the requirements for the position.

However, despite media attention, litigation, legislation, and organized or individual advocacy, 180,000 Ohioans who have mental retardation remain at home and unemployed. Mental retardation affects between two and three percent of the population statewide. On a national basis it is 100 times more prevalent than total blindness.

Mental retardation is present from childhood and is characterized by lowered functional intelligence as measured on a standardized test and significant limitations in two or more adaptive skill areas (communication, self-care, home living, social skills, leisure, health and safety, functional academics, community use and work). More than 80 percent of those with mental retardation have such minimal learning impairment that, with or without accommodation, they have potential for employment.

The Arc, the largest voluntary organization with the sole purpose of addressing issues of mental retardation, administers a major employer incentive program under the Federal Job Training Partnership Act (JTPA). Funded by the U.S. Department of Labor, the Arc's 29-year-old National Employment and Training Program (NETP) reimburses employers for the costs associated with training people with mental retardation who are more than 16 years of age and are "qualified applicants."

An employer can receive reimbursement for 50 percent of a trainee's entry wage for the first 160 hours of work and 25 percent of the wage for the second 160 hours. Among other criteria, employers also must offer at least 20 hours per week of year-round employment and pay at least basic minimum wage. Examples of positions for which Ohio businesses have successfully trained people with mental retardation include: auto detailer, cook, delivery person, dock loader, factory assembler, machinist, mechanical helper, porter, telephone operator, veterinary assistant and various clerical jobs.

The need for accommodations has run the gamut from no assistance or natural workplace supports to job coaching. Some employees have required inexpensive purchases and adjustments in policies or procedures, such as alarm watches, color coding, oral and repetitive directions, modified work schedules or job restructuring.

Ohio is the second largest user of the NETP in the nation, but there remains potential for thousands of Ohioans to be assisted in employment annually through this incentive. Hiring individuals with mental retardation makes socioeconomic sense – employers obtain diligent workers with above average attendance and below average turnover rates; individuals gain the dignity of being employed; and communities acquire productive, taxpaying citizens. For information on NETP funds, call your county board of mental retardation/developmental disabilities, or Wanda Trigg at The Arc National Headquarters, (800) 433-5255.

Survey says...

Employers satisfied with mentally disabled workers

Most surveyed employers with workers who have mental disabilities said that they were satisfied with the employees' job performance and did not find the costs of accommodating them unreasonable, according to a white paper on the ADA from Northwestern University's Annenberg Washington Program in Communications Policy Studies.

The white paper discusses two studies conducted in 1989 and 1990 which focused on about 1,500 workers with mental retardation and 47 of their employers. The workplaces included stores, restaurants, laboratories, hotels and hospitals. Study II, which surveyed employers, found that more than half were very satisfied with the workers' productivity (59 percent); the vast majority (96 percent) were very satisfied with work attendance; and 78 percent were very satisfied with the workers' dedication. Although 67 percent said they were very satisfied with their disabled employees' interactions with coworkers, only 40 percent were very satisfied with their interactions with customers, the report said.

Ninety-five percent of respondents in the employer study said that their workers with mental disabilities did not have higher turnover rates than non-disabled employees in similar jobs, and 100 percent said that mentally disabled employees did not have higher levels of absenteeism. Ninety-three percent said that workers with mental disabilities were not a safety risk, and 69 percent said that the job performance and productivity of workers with mental disabilities were not necessarily lower than those of other employees. In addition, 65 percent said they believed that adequate funding sources were available for workplace accommodations.

The white paper, "The Americans with Disabilities Act: Putting the Employment Provisions to Work," is on the internet at: http://www.annenberg.nwu.edu.

Medical Exams and Inquiries

Employers must review process used to screen job applicants

(NOTE: The term "medical" in the following means "medical and psychological.")

One of the larger effects that ADA has had on the workplace has been to change the way employers bring in new employees. At least for employers with 15 or more employees, the days of using medical and psychological inquiries to screen out applicants are gone.

A point lost on some employers is that ADA's requirements about the collection and use of medical information apply to *all* new applicants coming in the door, not just the ones who seem to have a disability. Of course, that's only logical, you are thinking – how else would each applicant be given the same opportunity?

And you are correct. However, not everyone has clearly understood that what we're talking about is a permanent change in the intake process. This is not business as usual. Even though I advise employers not to be afraid of ADA – compliance doesn't have to be difficult or expensive – we cannot sugar-coat the law. It has made a difference and employers must revise their processes.

Job intake sequence

The new order in the intake for job applicants is:

- *interview* – The employer uses the interview to determine whether the candidate is qualified for the job and whether there is a match between the job duties and the candidate's skills. Because this first step is about ability, not disability, medical information cannot be solicited at this point.
- *job offer* – The employer makes a conditional job offer to the individual who is most qualified and most skilled. The condition is that the candidate is, in fact, able to perform the job.
- *medical exam* – After a conditional job offer, the employer is free to require a medical examination just as in the past. The difference now is that any information obtained that does not relate directly to the candidate's ability to perform the job cannot be used to screen out the candidate. For example, a previous back injury may not affect a person's ability to do a desk job at all, but might entirely prevent that same person from being a roofer. When the medical exam reveals a back injury that will not affect job performance, that information must be disregarded. If it will affect performance, and no accommodation is possible, the employer may withdraw the offer.

Who can be examined?

If a post-offer exam is given, everyone entering a particular job category must receive it. If a response to an initial inquiry (such as a medical history questionnaire) reveals that an applicant has had a previous injury, illness

In the courts

Doctor's opinion faulted

An employer that relied on a physician's opinion in making an employment decision is liable for discrimination under the ADA, according to the decision in *EEOC v. Texas Bus Lines*. The court ruled that the company discriminated against an obese job applicant when it refused to hire her as an airport van driver. The court found that the company perceived the driver as having a disability when it rejected her based on one doctor's opinion that she would not be able to move quickly in case of an accident.

Arezella Manuel applied for employment with Texas Bus Lines in March 1994. She was interviewed, her references were checked and she passed the company's road test. Texas Bus Lines extended a job offer to Manuel, contingent upon her passing a physical examination as mandated by the Federal Motor Carrier Safety Regulations. The examining physician found that Manuel had no medical problems and marked her as "normal" for each of the examination categories, the EEOC said. But after spending only five minutes with Manuel and conducting no mobility or agility tests, the doctor refused to grant her the medical examiner's certificate required by the Department of Transportation. Based on an observation of Manuel as she walked from the waiting room to the examining room, the doctor concluded that she would be unable to move swiftly to help passengers in case of an accident. Texas Bus Lines withdrew the job offer.

The EEOC contended that because the doctor did not base his opinion on any valid medical data, Texas Bus Lines was unjustified in relying upon his conclusion. DOT regulations do not dictate that drivers maintain any particular weight or level of mobility and do not require that a physician evaluate a driver's ability to handle extreme emergency situations. The company should have realized that the doctor's opinion was "baseless," and sent Manuel to a second doctor, EEOC said.

The bus company's argument that Manuel was not qualified under DOT regulations solely on account of her weight "is neither supported by the objective medical findings nor the DOT regulations," the court said. Moreover, the company's decision not to hire Manuel because of a perception of disability violated the ADA because it was based on "myth, fear or stereotype."

From BNA's *ADA Manual* © 1996

or medical condition, the employer cannot require the applicant to undergo a medical exam unless all applicants in that job category are required to have such an exam. However, the scope of exams need not be identical.

In other words, when exam or inquiry indicates that further information is needed, the employer may give follow-up tests or exams. For example, all potential employees in a job category must be given a blood test, but if a person's initial test indicates a problem that may affect job performance, further tests may be given to that person only, in order to get necessary information.

Answering illegal questions

People with disabilities need to know that the question, "Have you ever had any of the following conditions?" that still appears on some job applications is illegal when asked in the pre-offer phase. As are any similar inquiries asked orally in face-to-face interviews. However, you can't look to ADA for guidance on how to respond to these inquiries. True, the coming of ADA has made these questions illegal and provided legal recourse for people who are discriminated against. But even when such questions were legal, people in the disability community (wherever that is) have debated about how to respond.

By law the individual need not answer at all. Realistically, the best solution to this dilemma is determined, as always, on a case-by-case basis – what is the individual comfortable with, how well is the employer known, how egregious is the offense?

Drug testing

Testing for the illegal use of drugs is not considered a medical exam under ADA. (This includes the illegal use of legal drugs.) Therefore, drug testing may be conducted at any time and is not subject to the restrictions described under "Job Intake Sequence" above. The major concern for employers is about drug testing in the pre-offer phase. Discovering a candidate's use of a legal drug may reveal the existence of a disability that the employer is not permitted to know about.

Because some employers use drug testing as an early screen-out device, much advice about handling this dilemma has been bandied about. The Equal Employment Opportunity Commission (EEOC), which enforces the employment portion of ADA, has said "If an employer conducts a test solely for unlawful drug use, but receives test results indicating lawful drug use, the employer has not violated the ADA."

EEOC's position notwithstanding, some employers remain concerned that possessing such information puts them at risk in the event that a person with a disability, for whatever reason, is not hired. Unofficial advice: For those employers who cannot be persuaded otherwise, perhaps the safest course is to do drug testing in the post-offer phase only.

– D.C.

Use and timing of applicant or employee medical inquiries

With respect to applicants, the ADA establishes that no pre-offer inquiries regarding medical history or physical testing are permissible. Broad questions such as "Have you ever been hospitalized and if so, for what?" are not allowed. Pre-employment inquiries are limited to questions concerning the ability of an applicant to perform the essential functions of a job with or without reasonable accommodations. Employers may ask an individual with a known disability (or a visible disability) to describe or demonstrate how functions of the job will be performed. The individual can request reasonable accommodation for the demonstration.

After an offer of employment has been made, an individual can be required to undergo a medical examination if all applicants for such positions are examined. The information from the test must be kept confidential.

Confidentiality is an important component of the ADA's regulations. Employers are required to maintain a separate medical file distinct from a worker's general personnel file. Under certain circumstances, information that is otherwise confidential can be shared: supervisory personnel may be informed about an individual's medical restrictions or necessary accommodations; safety or first aid personnel may be advised if particular treatment or special evacuation assistance will be necessary; government officials investigating compliance with the ADA may get access pursuant to their investigation; inquiries

Q May an employer ask a job applicant about the number of days he or she has been sick in the previous year?

A An employer may state its attendance requirements and ask whether an applicant can meet them. Further, an employer may ask how many days the applicant was *absent* from the last job. However, at the pre-offer stage, an employer may not ask how many days an applicant was *sick*, because such inquiry is likely to elicit information about a disability. After a job offer has been made, an employer may make inquiries concerning prior sick days, as long as the practice is applied to all entering employees in the same job category.

and Workers' Compensation or second injury fund office, and employer health or life insurance companies or administrators may get information related to claims.

Current employees also have protections under the ADA. Medical exams or inquiries are only permissible with respect to incumbents if they are job-related and all individuals in the same category are subject to the same questioning. The same confidentiality protections apply.

Information obtained in the process of testing for illegal drugs, such as that an individual is taking a prescription medication to control a particular disability, is to be treated as confidential medical information.

The ADA has established a carefully structured process to ensure that individuals with disabilities are evaluated on their merits rather than on the myths or misconceptions that may surround their disabilities.

From a response by Matthew D. Cohen, Esq. to a question submitted to *Disability Compliance Bulletin* © 1994

Pre-hire screening for back problems can comply with ADA

Screening programs aimed at keeping workers prone to back injuries out of high-risk jobs can be reconciled with the ADA, a specialist in ergonomics told a lower-back injury symposium at The Ohio State University in 1993.

To pass muster under ADA, any form of pre-employment testing needs to be clearly job-related, said Chuck Anderson, president of the Dallas-based testing firm Advanced Ergonomics Inc. "There should be a high degree of similarity between the job and what the person is doing [in the pre-employment test]." Testing also has to be valid and objective, he said, and it needs to be combined with thorough job analysis, focusing on strength requirements along with any endurance and posture requirements.

"There is a lot of research out there now that indicates how physical parameters such as age, height, weight and sex are not good indicators of a person's physical ability to do a job," Anderson said. Some medical tests being used to identify people at risk of injury on the job also are not good predictors of future performance, he said.

Such medical testing also could run afoul of the ADA another way, since the law prohibits pre-employment medical inquiries or testing until a job offer is made, said Columbus attorney Michael G. Moore. But he said the ADA still allows an employer to devise physical and other job criteria and tests, provided the tests are job-related and consistent with business objectives. "There's going to be a lot of litigation," Moore said.

People with a prior history of back injuries would meet the act's definition of disability, but plaintiffs claiming they are qualified potential employees with a disability will have the burden to establish that in court, Moore said. "After a person has proved that, the employer has the burden of proving that reasonable accommodations cannot be made to allow the person to do that job without undue hardship."

resources

Great Lakes Disability & Business Technical Assistance Center, (800) 949-4ADA voice/TTY.

Definition of disability issued by EEOC

The Equal Employment Opportunity Commission (EEOC) has issued guidance on how to determine whether an individual has a disability as defined by the ADA. Developed for EEOC field investigators to use in examining employment complaints, the material cites examples (two below) from real cases. At more than 80 pages, it is highly technical, somewhat turgid reading.

Example 1 – Several years ago, the charging party (CP) was hospitalized for treatment for a cocaine addiction. He has been rehabilitated successfully and has not engaged in the illegal use of drugs since receiving treatment. CP, who has a record of an impairment that substantially limited his major life activities, is covered by the ADA.

Example 2 – Three years ago, CP was arrested and convicted of the possession of cocaine. He had used the substance occasionally, three or four times over a 16-month period. CP has not used cocaine or any other illegal drug since his arrest. CP is not covered by the ADA. Although CP has a record of cocaine use, the use was not an addiction and did not substantially limit any of CP's major life activities.

Guidance on pre-employment questions

ADA Enforcement Guidance: Pre-Employment Disability-Related Questions and Medical Exams covers the restrictions on the type of medical information that employers can ask job applicants about. There are several changes to the interim guidance issued by EEOC in 1994. Most notably, it clarifies that employers may ask certain questions about reasonable accommodation at the pre-offer stage. In particular, employers are now permitted to ask limited questions about reasonable accommodation if they reasonably believe the applicant will need accommodation – a disability may be obvious, or the applicant may voluntarily disclose that he or she has a disability or will need an accommodation.

Human resource guides available

Four free publications, developed by IAM Cares, focus on employment issues: "A Guide for Approaching Job Descriptions and Determining Qualifications," "A Guide for Interviewing," "A Guide to Selected Forms of Accommodations: Rescheduling Work Hours, Restructuring a Job or Reassigning Employees" and "A Guide to Selected Forms of Accommodation: Modified and Specialized Equipment."

Defining Essential Functions

Identification of essential tasks can protect employer, employee

The key to understanding the ADA is understanding the concept of *essential functions* in the context of job duties. This is why: Employers must know what their jobs' essential functions are in order to match jobs to individuals and accommodate individuals who have disabilities. Making appropriate matches and accommodations will, in the great majority of cases, ensure compliance with the ADA and protect both the employer and the employee. A person with a disability who cannot perform the essential functions of a job does not have to be hired or retained. On the other hand, an applicant or employee with a disability cannot be excluded because of an inability to perform a marginal function.

ADA regulations state that *"essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires." In its Technical Assistance Manual, the EEOC elaborates on this definition for nearly 10 full pages. Why so lengthy? Because EEOC recognizes there are many ways of thinking about what is fundamental to a job.

A person with a disability who cannot perform the essential functions of a job does not have to be hired or retained.

Determining what is essential

Determining whether a function is essential ordinarily starts with two considerations:

1) **Does the employer actually require employees in the position to perform the function?**
   EXAMPLE: A job description for a receptionist includes typing as a function of the job. If no one in that job ever does any typing, however, then it cannot be considered an essential function.
   If the answer to Question 1 is yes, then the employer should consider the following question:
2) **Would removing the function fundamentally alter the job?**
   The employer may find the answer to Question 2 by considering the following three questions:
   2A) Does the position exist to perform the function?
   EXAMPLE: A proofreader must be able to perform proofreading. The ability to proofread accurately is an essential function. Removing that function to make an accommodation would mean that it is no longer a proofreader job.

An applicant/employee with a disability cannot be excluded because he or she cannot perform a marginal function.

2B) Is there a limited number of other employees available to perform the function, or among whom the function can be distributed?
EXAMPLE: In a high-volume front office with only three employees everyone must answer the phone. A person with a communication impairment who can perform all the other tasks may be excluded from the job if he or she cannot use the phone efficiently.

2C) Is the function highly specialized, and was the person in the position hired for special expertise or ability to perform it?
EXAMPLE: A company that is expanding into a foreign country may require fluent communication ability in another language as an essential function for jobs in the new operation.

In the courts

Employer need not lower production standards

The discharge of two grocery selectors with disabilities, due to their inability to meet newly established production standards, did not violate the ADA, held the Tenth Circuit Court of Appeals in *Milton v. Scrivner, Inc.* Charlie Milton and Gary Massey both worked for the same employer as grocery selectors, and they both sustained various on-the-job-injuries. When their employer established new production standards that they were unable to meet, both men were discharged. The employees alleged that the discharges violated the ADA and other federal and state laws, but a federal district court ruled against them. They sought review from the federal appeals court.

The ADA claims failed because the employees were not qualified individuals with a disability under that statute. Speed was essential to the job, and the employer presented unrebutted evidence of its inability to accommodate the employees' disabilities. The lower court's decision was affirmed.

From *Disability Compliance Bulletin* © 1995

Other evidence

In addition to the preceding questions, EEOC will consider eight other factors when investigating a complaint:

- **employer judgment**
  In spite of what employers may think, their determinations of what is essential to their jobs are significant factors to be considered along with other evidence. Although their judgments will not be the only or the most important factors, neither will their production standards be second-guessed. Employers set their own standards for quality and quantity.
- **written job description prepared before advertising a job or interviewing applicants**
  A written job description that was on hand before advertising or interviewing for a job began will be considered. However, if it no longer reflects the duties that are actually performed on the job, it will not be an important factor. NOTE: The ADA does not require job descriptions.
- **amount of time spent performing the function**
  If an employee spends most of the workday operating a particular machine, that operation is probably an essential function. (This item may need to be viewed in conjunction with the next one.)
- **consequences of not requiring a person in this job to perform a function**
  The firefighter example illustrates this factor best: Being able to carry a person from a burning building is clearly an essential function even if the ability is rarely needed.
- **terms of a collective bargaining agreement**
  Contract language that specifies the duties of a job will be considered, but as with a job description, only to the extent that it describes what is actually done on the job.
- **work experience of people who have performed the job in the past and who currently perform similar jobs**
  This may be the single most important of all the factors discussed here: What are current holders of this job doing now?
- **nature of the work operation**
  One business operates under periodic deadline-driven schedules. To afford maximum flexibility during times of peak activity, all production employees must be able to perform many tasks with different requirements. All these tasks are considered essential functions. In another business where production continues at a more or less stable level, production workers each repeatedly perform one major task. That task may be each worker's only essential function.
- **employer's organizational structure**
  A "team" operation may require each member to perform, on a rotating basis, all the functions of that team. All the functions may be considered essential.

Officer didn't control diabetes

A police officer with diabetes who failed to control and monitor his condition and had a diabetic reaction that resulted in a high-speed driving incident cannot claim ADA protection, a federal appeals court has held. In *Siefken v. Village of Arlington Heights, Ill.*, a former probationary police officer experienced a diabetic reaction, resulting in disorientation and memory loss, while driving a squad car. He drove at high speed through residential areas 40 miles outside his jurisdiction and stopped only when pulled over by other officers. When the village fired him, he sued under the ADA, claiming that but for his diabetes, the incident would not have occurred. Affirming a district court's order of dismissal, the U.S. Court of Appeals for the Seventh Circuit said the more immediate cause of the incident leading to the officer's termination was his failure to monitor his condition. The court agreed with the American Diabetes Association, which filed a friend-of-the-court brief, that "with current technology and proper monitoring, most diabetics can reduce the chances of severe hypoglycemic reaction to virtually nil." The officer did not do so, the court said, "and cannot now claim that the village must pay for his failure."

From BNA's *ADA Manual* © 1995

Food server could not perform

A restaurant did not have to accommodate a food server with mitral valve prolapse, dysautonomia, panic attack disorder and hypoglycemia who was unable to handle the work when the restaurant became crowded, an Alabama federal district court decided. The employee testified that she suffered panic attacks at these times and that the attacks left her confused.

Summary judgment was granted to the restaurant after the district court concluded that the worker was not a qualified individual for purposes of the ADA because her disability prevented her from performing her essential job functions. In *Johnson v. Morrison, Inc.*, the court learned that the employer attempted to accommodate the food server by assigning her to the least busy area, but still she could not handle the work when the restaurant became crowded. The employer was not required to provide another employee to handle the food server's duties. Furthermore, the employer was not required to remove the employee from her work station when it became crowded.

From *Disability Compliance Bulletin* © 1994

Marginal functions

When a person with a disability is unable to perform an essential function of a job, the employer must try to provide a reasonable accommodation. The rest of the requirement is this: When there is no accommodation that will allow a person to perform *marginal* functions, the employer must give those duties to other employees or arrange a trade of duties. In any case, the person with a disability must not be excluded because of the inability to perform a marginal function.

EXAMPLE: A candidate for a receptionist's job is able to answer the telephone, keep schedules on the computer and do filing, but his disability prevents driving. Thus he cannot make the twice-a-month delivery to the branch office on the other side of town that the previous holders of this position have made. Since there are several other people in the office who could do this task, he cannot be refused the job because he cannot drive.

Product v. process

Essential functions need to relate to the product or the results that an employer wants, not to the way in which a job is performed. Often, it may not be essential for a function to be done in a particular manner.

EXAMPLE: An employee who uses a computer may have to perform the essential functions of accessing, inputting and retrieving information from it. The essential functions would not be to manually enter or visually read information because there are adaptive devices and software programs for people without manual ability or good vision.

Changing essential functions

The ADA's intent is to ensure that employers evaluate each person's qualifications for a job in relation to that job's essential functions. Still, despite what some believe, employers retain the right to decide what tasks need to be accomplished and which functions go together to comprise a job. This includes the right to change what is essential to a particular job even if the result is that a person with a disability can no longer perform the job.

EXAMPLE: Employees in downsizing companies may find that they now have to perform duties that had been done by other people. Employers need to take each individual's abilities and limitations into account when combining jobs, just as they would for hiring new employees, and accommodations must be considered whenever necessary. However, in these situations the number of employees available to share job duties may become a factor (see "Defining Essential Functions," 2B, on page 16).

Modifying a job can include revising production standards, even if that unintentionally results in an employee with a disability no longer being able to perform the job, as long as the new standards are applied equally to all employees.

– D.C.

resources

Technical assistance manual, "EEO is the law" poster

The best resource for employers is the *Title I Technical Assistance Manual* from the Equal Employment Opportunity Commission (EEOC). This book discusses reasonable accommodation, undue hardship and the relationship between ADA and workers' compensation. It includes examples of real situations and will answer some of your questions.

The EEOC also prints an "EEO is the Law" poster for display in a conspicuous location where notices to applicants and employees are customarily placed. The ADA requires employers to post notices describing the federal laws that prohibit job discrimination and further mandates that this notice be available in a location that is accessible to people with mobility limitations and in a format that is accessible to people with vision or reading limitations (e.g., audio tape or reading aloud).

The manual (in print or on computer disk) and the poster (in print or on cassette) are free from: EEOC, P.O. Box 12549, Cincinnati, OH 45212; (800) 669-EEOC voice, (800) 800-3302 TTY.

Model job descriptions for the food service industry

Being clear about what functions are essential to a job can help an employer comply with ADA in two major ways: determining when a candidate with a disability is qualified, and deciding how to accommodate an employee with a disability. The National Restaurant Association publishes a comprehensive resource book called "Model Position Descriptions for the Food Service Industry." This book provides 43 separate, concise models for writing new job descriptions or for updating old ones. Cost is $16.45 for members, $33 for non-members, plus shipping. Contact the association at: 1200 17th St., NW, Washington, DC 20036-3097; (202) 331-5900, (202) 331-2429 fax.

DOJ documents on-line

The U.S. Department of Justice operates an electronic bulletin board system that contains its ADA regulations and technical assistance materials as well as some materials from other federal agencies. Download by computer modem: (202) 514-6193. Or access via the Internet: http://www.usdoj.gov/crt/ada/adahom1.htm

Reasonable Accommodation

When is it required?

Employers must provide reasonable accommodations to the *known* physical or mental limitations of a qualified applicant or employee with a disability. This obligation applies to all aspects of employment – when advertising, recruiting or accepting applications for a job, testing or interviewing applicants, and hiring, promoting, rewarding or disciplining employees.

Generally, it is the responsibility of the individual with a disability to let the employer know of the need for an accommodation. Moreover, the individual is in the best position to know *what* the accommodation should be. If the employer observes that an employee with a known disability is having difficulty performing job functions, the employer may raise the issue of the need for accommodation, to overcome performance problems, with the individual.

Employers will also encounter situations in which an individual's disability is not apparent, but the individual still requires accommodation. Under such circumstances, if the employer has been informed by the individual about the need for an accommodation and it would not be an undue hardship, the employer must provide it. For example, if an individual has a learning disability that makes it difficult to write and spell correctly, the employer could allow the individual to dictate reports. If an individual had a fused spine and could not bend or lift easily, the employer could redistribute nonessential functions that involve bending and lifting to other employees. If the functions were essential, the employer could allow the individual to do those functions in a sitting position. If an individual with a disability requests an accommodation and the need for it is not apparent, the employer may ask for documentation showing that the accommodation is necessary for the individual to perform the essential functions of the job.

When is it not required?

An employer is not required to provide an accommodation if it would be an *undue hardship*. An undue hardship is an employer action involving significant difficulty or expense; that is, an action that would be unduly costly, extensive, substantial, disruptive or that would fundamentally alter the nature or operation of the business. Determining whether a particular accommodation would be an undue hardship must be done on a case-by-case basis. These factors are considered when determining undue hardship:

- Nature and cost of the accommodation.
- The overall financial resources of the facility; number of employees; the effect on expenses and resources; or the impact of the accommodation on the facility.
- The overall resources of the covered entity; the overall business of the covered entity; the number of employees; number, type and locations of facilities.
- The type of operation or operations of the covered entity; including the composition, structure and functions of the work force; geographic separateness; administrative or financial relationship to the facility.

Given its relative nature, deciding if the ADA definition of undue hardship applies in a particular case may appear challenging. The key concept underlying any analysis is *reasonableness*. How reasonable is the accommodation? What might be reasonable for a large employer might be unreasonable or an undue hardship for a small employer.

EXAMPLE: A "mom and pop" cheesecake bakery has decided to hire one person to take orders by phone for the Christmas season. Given the size and nature of the operation, hiring an individual who is deaf to handle all telephone orders might be an undue hardship. The person would need a text telephone; locating and installing the phone would take time and be costly for the bakery; and using that phone would slow down the number of orders that could be taken. For a large, national mail-order house that manufactures and sells clothing directly to the public, hiring an individual who is deaf and providing a text telephone might not be an undue hardship because of the size of the work force and the availability of shift work with light to moderate call-in rates.

There are special circumstances in which reasonable accommodation is not required.

EXAMPLE: The ADA prohibits discrimination against an individual because of a known association with or relationship to an individual with a disability. An employer who knows that an individual's spouse is terminally ill and *on that basis* decides not to hire the qualified individual, would be in violation of the ADA Title I. However, if the employer does hire a person with a terminally ill spouse, the ADA does not require that the employer provide reasonable accommodation to the person, *i*.e. if that individual, as a condition of accepting an offer of employment, requests two hours, midday, three times a week to take the ill spouse to treatment, the employer could refuse the request and not offer the individual the job without violating the ADA.

EXAMPLE: An accommodation is not required if an individual refuses it. If an individual rejects an accommodation that is necessary to enable that person to perform the essential functions of the job, then the employer could withdraw the offer of employment since the individual would not be considered qualified.

From *A Guide to Selected Forms of Accommodation: Rescheduling Work Hours, Restructuring a Job, or Reassigning Employees* developed by IAM Cares *(see "resources" page 17).*

A sample accommodation policy

The ADA requires employers to provide reasonable accommodation to qualified employees and post-offer job applicants with disabilities when such accommodation is requested and is within the means of the organization. The following sample policy will help your organization respond properly to requests for accommodation in the workplace. Do not be misled. This policy will not make accommodation decisions for you, nor will it tell you how to decide. It can serve as a tool, however, to ensure that you consider all the relevant points.

1. WRITTEN POLICY

Clearly state your organization's policy on providing accommodations. Include it in your personnel manual, post it conspicuously within the workplace, and otherwise make it known to both employees and job applicants.

2. JOB DESCRIPTIONS

Although not required by the ADA, detailed, regularly updated job descriptions for each position are desirable for a variety of reasons that bear on ADA compliance, including properly matching job applicants to available positions and evaluating employee performance. They also help in evaluating requests for reasonable accommodation. Note that you should always check a job description *before* posting a job opening to ensure that it accurately describes *current* job duties.

a. ***job skills*** – Identify the skills and abilities currently used on the job. The job description should not include skills that are no longer required, such as taking shorthand, and it should not omit new skills that recently have become required, such as proficiency in a particular word processing program. Both employees and applicants must possess legitimate skills and abilities required for the position.

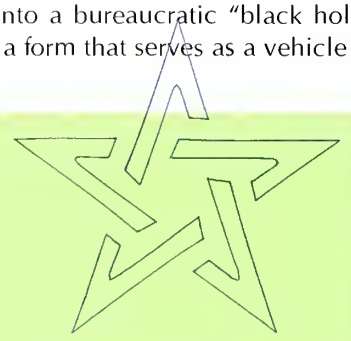
b. ***job duties*** – Identify the duties currently performed in the job. Involve the supervisor in this process and, when possible, an incumbent in the position. Performance criteria must be accurate. For example, if a job description requires "assembling 20 devices per hour" but the accepted production rate is 15 per hour, then the figure in the description is irrelevant.

c. ***essential/marginal*** – Apply the criteria in the definition of essential functions carefully. Job duties are essential if they are the reason the job exists (e.g., typing for a typist), if removing the duty would profoundly change the nature of the job (e.g., operating a forklift in a warehouse), if there are no other employees who could assume a particular duty (e.g., two hours per day of bookkeeping for the sole bookkeeper in the company). If a duty can be eliminated or given to another employee, it is, by definition, marginal.

3. EMPLOYEE NOTIFICATION

Notify an employee or post-offer applicant who is requesting an accommodation that the request will be thoroughly investigated. Failing to acknowledge the request leaves the impression that you are not responsive or that the request has fallen into a bureaucratic "black hole." You may wish to create a form that serves as a vehicle for

The Basic 4-Step Process



This four-step reasonable accommodation process is suggested by the Equal Employment Opportunity Commission. It provides a basic framework for employers who do not know how to proceed with a request for an accommodation. However, for some people this is too basic. If that is the case, use the above "sample policy" for reasonable accommodation. Using either one will *not* ensure that an employer will always come to the correct conclusion or prevail against an employee's complaint. However, the chances will be greatly improved and the good faith effort will be obvious.

1. *Analyze* the job and determine its essential functions.
2. *Determine* the employee's abilities and limitations (in consultation with the employee).
3. *Identify* potential accommodations and assess their effectiveness (in consultation with the employee).
4. *Choose* the accommodation that serves the needs of both the employee and the employer (after considering the employee's preference).

the employee to submit the accommodation request and for you to recognize receipt of the request.

4. INFORMATION GATHERING

Take advantage of every reasonable resource to help you collect pertinent data. This nearly always starts with the employee who is making the request. Other resources are management staff, the immediate supervisor, another incumbent in the position, and any specialists – ergonomics experts, rehabilitation counselors, rehabilitation technologists, etc. – whose skills are needed to evaluate or design a job modification. You might consider designating an ADA coordinator to facilitate this process. (This is required if you are a government entity with 50 or more employees.) Larger organizations may wish to establish a permanent reasonable accommodation committee with representatives from management, human resources, the union, and other employees. In many cases the ADA coordinator or committee will be able to arrange an accommodation using no more than the existing job description and sound negotiating skills.

NOTE: In all cases, coordinators, committee members, and other employees involved in the evaluation process must respect and protect the requesting employee's confidentiality rights. The ADA specifically provides that information about the employee's disability circumstances can be released only on a clear "need to know" basis. (For example, the only employees who may need to know are the immediate supervisor and safety personnel.) If other employees are to participate, it will have to be with the requesting employee's consent.

5. DOCUMENTATION OF DISABILITY

The employee requesting an accommodation must provide evidence of the need for accommodation. Further, the ADA provides you the right to obtain an additional medical or psychological evaluation at your own expense. Your demand for evidence of a qualifying disability cannot be punitive, but employees must understand that a reasonable accommodation cannot be had simply for the asking.

6. EVALUATION OF A REQUEST

First, evaluate the existing job description (see item #2 on previous page). Is it accurate? When assessing a job for a potential accommodation, using an outmoded description can place you at risk.

a. ***Compare duties*** – Compare *all* duties to the limitations described by health professionals who have documented the employee's (or post-offer applicant's) disability. Do not be concerned about job duties that are within the individual's abilities; in other words, there is no need to consider reasonable accommodation or reassignment of duties for those functions the employee can still perform.

b. ***Remove marginal functions*** – Eliminate all marginal duties that the employee cannot perform *because of* the disability. Exchange them with other employees to maintain balanced workloads (but take care that the trades are not punitive – e.g., the employee gives up desirable duties but receives only undesirable ones). If eliminating or exchanging duties results in a shorter workday, then the employee may be paid only for the hours worked.

c. ***Accommodate essential functions*** – You must consider reasonable accommodation for all essential job duties that the employee cannot perform *because of* the disability.

d. ***Identify the problem*** – What aspect of the job can the employee not perform because of the disability? Think about results or product, not process. *EXAMPLE:* Instead of the process of lifting or carrying heavy objects from a loading dock to a storage area, think of the results: moving those objects – which may be accomplished with human or mechanical help.

e. ***Research possible solutions*** – Locate specialist individuals and organizations to help you find solutions. They may be in your own organization – some safety and loss control departments have people with ergonomics training already on staff. The Job Accommodation Network (800-526-7234 v/TTY) and many other agencies can provide free assistance. See the EEOC's Title I Technical Assistance Manual for resources. If you hear your staff saying, "but we've always done it this way," that may be a clue that a no-cost accommodation might be found simply through discussion, as described in the first two items below. Solutions may include:
   - *modified procedures* – This can include changing the sequence or the time of day in which duties are performed. You might allow a production worker to obtain materials just before the beginning of a shift when a dolly is readily available, or perhaps you could assign another worker to bring materials. A typist might be permitted to shift between tasks according to need rather than an established schedule.
   - *modified policies* – An example is allowing a later start time or longer breaks for a person with diabetes or multiple sclerosis. This does *not* include reducing performance standards or paying a person for a full day when less than a full day was worked.
   - *job modifications* – Modifying the way duties are performed may be as simple as reorganizing a work station or retooling a machine to allow its operation by the opposite hand.
   - *assistive devices* – This includes anything that facilitates a function for a person with a disability. Think broadly to include common and low-tech items. A dolly is an assistive device. So are hand controls on a vehicle and voice-activated computer programs.

f. ***Estimate costs*** – Many accommodations involve altering workplace practices and carry price tags well within the means of most organizations. Nevertheless, some may be expensive and could even

threaten profitability. If so, accommodation may qualify as an "undue hardship" and thus would not be required. This is your determination.

g. ***Consider productivity*** – An accommodation that materially interferes with workflow may reduce productivity for a work unit. Such an accommodation would qualify as an "undue hardship" and thus would not be required. However, you should evaluate this with great care because some changes in work procedures have the long-term effect of increasing productivity for everyone involved. A hasty conclusion may put you at risk.

h. ***Consider safety*** – An accommodation will not have to be made if it puts the person with a disability, coworkers, or the public at serious risk of harm. The determination of direct threat must be made carefully and must not be based on conjecture. For example, a person with a vision impairment does not have to be employed as a pilot. On the other hand, a person who uses a wheelchair cannot be refused a job in a high-rise office building because of an employer's fears about emergency evacuation.

7. THE CHOICE

You must consult with the employee and give consideration to his or her preference. But when there is more than one effective accommodation available, you have the right to make the final choice.

8. WRITTEN OFFER

When you have decided on an accommodation, make the offer to the employee in writing. Again, you may want to create a form.

9. DOCUMENTATION

Keep complete records of all research and deliberations of the ADA coordinator or committee. Even though most accommodation processes go smoothly when all parties are making a legitimate effort, an employee, particularly one who is not accommodated, may be dissatisfied and file a complaint. Documentation of the process may defeat the claim and, at the least, will provide evidence of "good faith effort," which will preclude punitive damages. Retain the documentation developed about a reasonable accommodation, but do not mix it with other personnel records. Since accommodation deliberations inevitably will contain information about disability, you must safeguard the employee's right to confidentiality.

10. LEGAL ADVICE

Think about obtaining a legal opinion when you are concluding that you cannot accommodate a request for reasons of "undue hardship" or "direct threat." The burden of proof for the defense can be difficult, and the cost of improperly asserting the defense very high. You might also want to seek counsel when you are contemplating offering an accommodation but have concerns about direct threat.

– D.C.

2 examples

Employer may choose among effective accommodations...

The Office of Civil Rights (OCR) has rejected the claim of a school district employee with narcolepsy that her employer denied her a reasonable accommodation for a particular school year. The employee's condition limited her ability to drive an automobile safely for more than 15 to 20 minutes. She alleged that the district offered her positions that it knew she could not accept because they were far from her home.

OCR found that the district had offered the employee a reasonable accommodation for the school year: a transfer to a district located reasonably close to her home. Further, the position that was offered was equivalent to the one formerly held with respect to duties and responsibilities. Although the employee ultimately rejected the accommodation, the district's offer was nonetheless a reasonable accommodation; an employer may choose among effective accommodations when evaluating the needs of an employee with a disability. Thus, neither Section 504 nor Title II of the ADA was violated.

ADA Compliance Guide © 1993

...after seeking employee input

A state employee in Wisconsin who uses a wheelchair claimed the state failed to accommodate her requests to work full time at home while recovering from pressure ulcers and to make the workplace kitchenette accessible.

The court found that the employer provided the employee work for all but 16.5 hours of the time for which she requested work, which came to just under 95 percent of the hours for which she requested accommodation. For the remaining hours, she took paid sick leave. In addition, the employer modified the kitchenette and asked the employee to use already existing, comparable facilities rather than spend over $1,000 to rebuild the entire kitchenette.

These accommodations were reasonable, the court said, citing the EEOC rules implementing Title I which state that an employer need not accommodate an employee in the manner requested or provide the employee with the "best" possible accommodation. While the employee's preference should be given "primary consideration," the employer has the ultimate discretion to choose between effective accommodations, the court said.

From BNA's *ADA Manual* © 1994

Hook up to JAN: the Job Accommodation Network

Accommodation does not always mean spending money. Simply modifying a workplace practice can sometimes produce a no-cost accommodation. Coming up with a successful reasonable accommodation requires three ingredients that are more important than money: an openness to new ways of doing things, a willingness to involve the employee with a disability thoroughly in the process, and a measure of creativity. What happens, however, when an employer with good intent is seated across the interview table from a person with a disability, and neither has a clue as to whether there is a way to accommodate the individual?

An individual becomes, of necessity, the true expert on his or her own disability. Nevertheless, some accommodations simply are not obvious to either party. When the employer believes that the candidate cannot perform the job's essential functions, the job intake process ends. An offer of employment is not made. What then?

It is not reasonable to expect every employer to have a rehabilitation technologist on staff or even on retainer. Yet both employers and employees need easy access to basic ideas about accommodations. That access is already here via a toll-free telephone call.

The Job Accommodation Network (JAN) was established in 1983 as a free service of the President's Committee on Employment of People with Disabilities. It has grown with the times and become a sophisticated, computerized resource for anyone who needs consultation on accommodations. From its inception through 1990, JAN provided services for approximately 25,000 cases in the U.S. and Canada – roughly 3,000 per year. During 1993-94, the yearly total had reached nearly 22,000, and the current year promises to eclipse that figure by a significant margin.

Why so popular? Because the telephone lines are staffed with trained, experienced human-factors consultants who have access to a myriad of resources. Here are examples of the range of information you might obtain from a JAN consultant:

- suggested changes in work activities;
- alterations in work station or site;
- product information;
- referral to another resource;
- ADA information; and
- funding sources/tax incentives.

The JAN consultants are generalists and specialists at the same time, each focusing efforts on a particular area of expertise, depending on background and experience. If modifying or purchasing equipment appears to be a solution, the caller will be provided with equipment descriptions, the location and telephone number of the nearest distributor for this equipment, and cost information. If fabrication of a device or on-site evaluation is necessary, the consultant will make suggestions and then refer the caller to a rehabilitation technologist in the area. JAN maintains files on products from more than 4,000 wholesalers and manufacturers, as well as from thousands of service organizations, rehabilitation agencies and private consulting services. It has access to its own vast history of previous cases, now numbering more than 100,000, from which to cull ideas. Information is available from JAN by telephone, fax, computer and regular mail, whichever is most convenient for the caller.

JAN conducts a continuous self-evaluation and publishes a 15-page quarterly progress report. One of its seminal findings was the cost of accommodations (from October 1992 through March 1995), half of which were less than $200. Employers calculate that they have realized at least $30 in benefits for every dollar spent on accommodations.

Of course JAN does not have all the answers, and not every situation can be resolved sight unseen. But it has served many employers and been instrumental in the hiring and retaining of thousands of people – resulting in enormous economic benefit to individuals and society.

If you are an individual, remember that you are in the strongest position when you have the greatest amount of information. Talk to JAN on your own behalf. If you are an employer, don't worry that you are not an expert on disability or accommodations. Worse, don't conclude that accommodation is not possible without consulting JAN. Regardless of whether your situation is complex or simple, JAN is the starting place when you don't know the next step. Call JAN at (800) 526-7234 or (800) ADA-WORK or write to 918 Chestnut Ridge Rd., Suite 1, WVU P.O. Box 6080, Morgantown, WV 26506-6080. The JAN internet site is: http://janweb.icdi.wvu.edu.

– D.C.

resource

Great Lakes Disability & Business Technical Assistance Center, (800) 949-4ADA voice/TTY.

Implementing the ADA series

Cornell University's Program on Employment and Disability has produced several pamphlets relevant to the ADA. Products in the "Implementing the ADA" series address working effectively with and making workplace accommodations for people with: cognitive disabilities, brain injury, blindness or visual impairments, diabetes, psychiatric disabilities, substance abuse problems, learning disabilities, allergies, HIV, musculoskeletal disorders, and deafness and hearing impairments.

Additional titles focus on injured workers, indoor air quality and health benefit plans.

The issue of absenteeism

In *Tyndall* v. *National Education Centers*, the U.S. Court of Appeals for the Fourth Circuit held that a medical-assistant instructor with lupus, who had a son with gastro-esophageal reflux disease, was not protected by the ADA, since she was unable to meet the job's attendance requirements. Despite the employer's accommodation efforts, which included permitting the employee to take sick leave, come into work late and leave early, and take breaks from ongoing classes when she felt ill, the employee missed almost 40 days of work during a seven-month period, related to either her own or her son's condition. The court noted that the same person who fired the instructor had hired her two years earlier, knowing of her disability – a fact that contributed to a "strong inference of nòn-discrimination."

In *Dutton* v. *Johnson County Board of County Commissioners*, a federal district court refused to dismiss the ADA claim of an employee who was fired due to absences related to migraine headaches. Observing that while regular attendance is an essential part of almost every job, the court found the employer did not show that permitting the employee to use unscheduled vacation to cover absences due to illness would either be an unreasonable accommodation or one that caused undue hardship. The court ordered that the employee was entitled to reinstatement and back pay of $49,877. The employer did not make a good faith effort to accommodate his disability. The employee did not ask that he be permitted more absences than any other employee, but only that he not be required to inform the county in advance to use his vacation time.

In *Carr v. Reno*, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a decision favoring the U.S. Attorney's Office in an action by a former coding clerk who alleged discriminatory discharge under Section 501 of the Rehabilitation Act. The clerk was absent 477 hours in her first seven months of work because of Meniere's Disease, an ear condition that causes dizziness and nausea. The court determined that an individual is "qualified" under the Rehab Act if able to perform essential job functions, either with or without accommodations. According to the court, essential functions of any government job are to appear for work and complete assigned tasks within a reasonable period of time. It pointed out that the employee could not work regular hours, either with or without accommodations. It concluded that it would be unreasonable to ask the government to put up with poor attendance or require it to refer the employee to another agency for employment.

Do co-workers have right to know of reasonable accommodation?

Reasonable accommodation under the ADA provides separate requirements for employer and employee. The employee, if qualified, must request the accommodation, and the employer must grant it unless it would cause an undue hardship on the business.

Seemingly left out of that equation is the impact of reasonable accommodation on other employees. Should co-workers be told the reason an accommodation was granted? Should the nature of the disability be revealed? Do unions have special disclosure rights?

> *"The employer cannot disclose the nature of a disability except in limited ways: to management involved in the reasonable accommodation process; to safety/first aid officials; and to government officials conducting an investigation – not to co-workers, not to unions."*

These were among the issues explored at a conference of the President's Committee on Employment of People with Disabilities in Atlanta. Four attorneys agreed that the ADA requires strict confidentiality on disability-related information.

"The ADA is very clear," said lawyer Jonathan R. Nook, a partner with Ogletree, Deakins, Nash, Smoak & Stewart. "The employer cannot disclose the nature of a disability except in limited ways: to management involved in the reasonable accommodation process; to safety/first aid officials; and to government officials conducting an investigation – *not* to co-workers, *not* to unions."

Even if disability-specific information isn't disclosed, however, co-workers who attain knowledge of an accommodation might naturally assume that the employee has a disability. Peggy N. Mastroianni, director of the Equal Employment Opportunity Commission's ADA Policy Division, addressed three different scenarios:

- Can you tell co-workers about another employee's disability? "No, with no exceptions," she said.
- Can you tell co-workers that an employee can perform certain tasks but not perform others? "Maybe," Mastroianni said. "That information is not necessarily disability-related."
- Can you tell co-workers that the employee needs reasonable accommodation? "Again, maybe," she said. "We're still arguing about that."

To qualify for reasonable accommodation, an employee must be able to perform the essential functions of the job. But in granting the accommodation, "marginal" job functions may be shifted to other employees. This no

doubt raises curiosity in workers and perhaps some animosity, too.

"Many accommodations have a psychological impact on other workers," said attorney Stephen M. Koslow. "Employee morale is a very important quality to be nurtured and maintained. Equity in the distribution of work is important to employees."

Mastroianni said the statute distinguishes between accommodations that have a negative psychological effect on other employees and accommodations that affect other employees' ability to produce. "Poor morale alone is not an undue hardship," Mastroianni said. "On the other hand, in certain cases reasonable accommodation may have an effect on others' ability to work."

To head off resentment against the accommodated employee, Mastroianni urged employers to state clearly to workers – when they are hired – that the company must comply with federal law. "Put it in the employee handbook," she said. "Workers should be prepared to see other workers with different arrangements in compliance with federal law."

Unions add another player into the mix. According to Mary K. O'Melveny, headquarters counsel for Communications Workers of America, an employer has an obligation to consult with the union – especially if the accommodation affects major terms of employment like hours and wages. But since the ADA is essentially silent on the role of unions in accommodations, such disclosure could be viewed as a breach of the law's confidentiality standards, O'Melveny said.

The National Labor Relations Board (NLRB) stated that employers must balance the union's need for information against the privacy of individuals.

"NLRB loves balancing because that means they don't have to make a decision," said Dion Y. Kohler of Ogletree, Deakins, Nash, Smoak & Stewart. "That's great for a judicious board because they can take each case individually. But as an employer, that puts you in a dangerous guessing game."

Mastroianni said the EEOC and NLRB began meeting two years ago to resolve differences between the two federal laws, but talks broke off with only "a memorandum of understanding" produced.

One remaining issue can render much of the discussion moot: What if the person with a disability who is being accommodated voluntarily discloses the information to workers and the union?

"There's nothing in the ADA that prevents a person from disclosing" information about a disability, Mastroianni said. "But disclosure is a very difficult issue, and a very personal one. Once disclosure is made, many of these issues go away."

resources

Advice on telecommuting as an accommodation

For many, the answer to lengthy commutes made more difficult by physical disabilities is the dream of telecommuting. And some courts have found telecommuting to be a reasonable accommodation. A *Telecommuting Program Development Handbook* from Southwestern Bell Telephone's HomeOffice Service tells how to develop a proposal, conduct an evaluation survey, assemble a telecommuting team, perform a cost/benefit study, develop procedures, and train supervisors and telecommuters. Call Chrisie LaPoint, (314) 235-3910.

Emergency procedures addressed by FEMA

Are you reluctant to hire people with disabilities because of concerns about safety and evacuation in an emergency? Now there is a third reason why you should get over that hesitation. (The first two are that it is illegal and causes you to lose out on many good employees.) The Federal Emergency Management Agency (FEMA) has published an excellent resource called *Emergency Procedures for Employees with Disabilities in Office Occupancies*. This 26-page booklet is clear, thorough and sensitively written. It offers help on assessing your situation and developing a plan of action. A limited number of copies are available from the Great Lakes Disability and Business Technical Assistance Center, (800) 949-4ADA, for a minimal postage and handling charge.

Stop by your library

Access to ADA information is as easy as a trip to your local library. The U.S. Department of Justice sent an ADA Information File containing 35 technical assistance documents to more than 15,000 libraries. In addition to the act itself, regulations and technical assistance manuals, the file contains industry-specific materials for restaurants, supermarkets, health care facilities, hotels/motels, child care facilities, car sales/service, fun/fitness centers and retail stores. Also included are materials about communication access, state and local governments, and other ADA resources. Most libraries keep the file at the reference desk.

For more information on contacting the DOJ, see page 82.

Reassignment is a form of accommodation in Ohio case

A trial court wrongfully ruled against a former city employee who alleged that he was terminated from employment in violation of Section 504 and Ohio state law, an appellate court in Ohio has decided. The appellate court found that the trial court erred when, among other things, it ruled that reasonable accommodation under the state law does not encompass reassignment to a vacant position (*Wooten v. City of Columbus*).

In the case, a city mechanic with a hearing impairment and a history of hernia injuries alleged that his employment was terminated on the basis of disability, in violation of Section 504 and state law. The mechanic position required the ability to exert up to 100 pounds of force occasionally, 50 pounds of force frequently and up to 20 pounds of force constantly. After a third operation, the employee's physician placed a permanent 20-pound lifting restriction on that employee's activities. A trial court granted the employer's motion for summary judgment, and the employee appealed.

First, the appellate court found that the lower court erred when it determined that the employee was not handicapped within the meaning of Section 504; the evidence showed that the employee's hernia injuries limited his major life activities. Similarly, as to the state law claim, the evidence supported a finding that the employee was substantially limited in his ability to hear and to perform manual tasks. In addition, a factual issue existed as to whether the employee was terminated for a nondiscriminatory reason. Finally, the trial court wrongfully ruled that reassignment to a vacant position was not a form of reasonable accommodation under state law. The decision of the lower court was reversed.

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Bargaining agreement conflict

An employer is not required to make an accommodation for a worker with a disability that would violate another employee's rights under a collective bargaining agreement, according to the U.S. District Court for the Western District of Michigan. In *Pattison v. Meijer*, a night-shift employee suffered a head injury in a motorcycle accident, which resulted in a seizure disorder. He asked the employer to reassign him to daytime work, explaining that he could not safely drive to work at night. He said flashing lights can induce seizures and his medication's side effects increase when he drives at night.

The employer refused, saying there was no vacant daytime position available. In addition, the employee was second in seniority under the labor contract, and reassigning him would violate the senior employee's rights.

From BNA's *ADA Manual* © 1995

In the courts

Accommodations for firefighter would cause undue hardship

A county fire department did not violate the 1973 Rehabilitation Act when it discharged a firefighter who had asthma and needed to use an inhaler, the U.S. Court of Appeals held in *Huber v. Howard County, Md.*

When a volunteer firefighter applied for a career position, he reported to a county physician that he had a history of "childhood" asthma and used an inhaler known as a bronchodilator. He was accepted into a training program, but was ordered to report for further medical evaluation when he failed to complete a required 1½ mile run.

Although his treating physician said the employee "most likely" could perform the duties of the job with medication, a pulmonary specialist chosen by the county strongly recommended against his being hired as a firefighter. The employee presented an additional opinion from an occupational specialist suggesting that the employee could be accommodated if his supervisors monitored his condition at the beginning of each work day. After an administrative hearing, the employee was discharged and filed a disability discrimination suit in federal district court, which granted summary judgment to the county.

Upholding the summary judgment, the appeals court found that the employee's proposed accommodations were not reasonable and would cause the county undue hardship.

From BNA's *ADA Manual* © 1995

Meeting time change required

In *Dees v. Austin Travis County Mental Health and Mental Retardation*, the U.S. District Court for the Western District of Texas ruled that a local agency that provides community services for persons with mental disabilities must change the early morning hour of its board meetings.

The suit was filed by Mary Dees, who takes prescribed medications to treat her mental illness. Some of the medications taken by Dees, who is an advocate for the rights of persons with mental illness, have a sedative side effect. As a result, her ability to function before 10 a.m. is limited. Dees alleged that Austin Travis County Mental Health and Mental Retardation (ATCMHMR), a community center that provides mental health and mental retardation services, violated Title II of the ADA by holding monthly board of trustees meetings at a time (8 a.m.) that made them inaccessible to people with certain types of mental illnesses.

U.S. District Judge Sam Sparks agreed. The judge relied on a Title II implementing regulation which requires public entities to make reasonable modifications when necessary to avoid disability discrimination – unless making the modifications would fundamentally alter the nature of the affected service, program or activity. ATCMHMR did not show that moving the meetings to 9 a.m. or later would fundamentally alter the nature of the board or create an undue administrative or financial burden, Judge Sparks ruled. The decision concluded that moving the board meeting to 9 a.m. or later was a reasonable accommodation under the ADA.

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No requirement to create permanent "light duty" positions

An employer is not required under the ADA to create a light-duty position or to convert a temporary light-duty position into a permanent one, a federal district court has held in *Mott v. Synthetic Industries*.

An employee whose work involved heavy lifting injured his lower back and was assigned to "light duty" for a month, after which he was placed on an unpaid leave of absence. Seven months later, his doctor told the employer that the employee still could not return to his regular job, but could return to "light work status" that required no heavy lifting or bending. Eventually, the employee was assigned to a less demanding job, but in the meantime he had filed a lawsuit, alleging that the company failed to accommodate him.

The court cited the EEOC Technical Assistance Manual, which states that the ADA does not require an employer to create light duty positions. In this case, the employer did not have any permanent light duty positions; rather, its policy was to provide temporary light duty jobs.

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Employer need not provide assistance in commuting

An inquirer asked the EEOC whether the ADA requires an employer to assist an employee with a disability in transferring from his automobile to a wheelchair when he arrives at work. The EEOC responded by explaining that the ADA requires employers to eliminate barriers that exist in the work environment, and not ones that exist outside the work environment. Transferring from an automobile to a wheelchair upon arrival at the workplace is part of the process of commuting, the response continued, and an employer does not have to provide assistance to an employee with a disability in transferring from an automobile to a wheelchair unless the employer provides assistance for employees without disabilities in getting to and from work.

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"Good Faith"

Many people know that the Civil Rights Act of 1991 established compensatory and punitive damages that may be assessed against an employer for acts of discrimination under the ADA. It has not been widely understood, however, that the same statute includes an important protection for employers called "Reasonable Accommodation and Good Faith Effort" (Section 102). Under this provision, an employer who is found to have discriminated by not providing a reasonable accommodation will not be subject to damages when it can show that it made a *good faith effort* to accommodate. Consulting with the Job Accommodation Network (see page 25) could be part of an employer's evidence that it did make a good faith effort. – D.C.

Weekend work can be required

The Office for Civil Rights (OCR) has rejected a switchboard operator's claim that her employer did not reasonably accommodate her multiple disabilities. The employee had multiple sclerosis and a hearing impairment, and was legally blind. She sought to be excused from working on Saturdays because she wanted to spend time with her guide dog and because the public transportation she used did not provide regular Saturday service.

With respect to the reasonable accommodation issue, OCR found that the library did not violate Section 504 or Title II of the Americans with Disabilities Act. Although the employee asked that she be excused from working on Saturdays, all part-time staff members were subject to working weekends. Further, the library accommodated the employee by not requiring her to work on Saturdays until she could make transportation arrangements.

OCR did find that the library's employment application violated both Section 504 and Title II because it required applicants to consent to taking a medical examination before an offer of employment was made.

From *Disability Compliance Bulletin* © 1993

Enforcement of Title I of the ADA occurs through the U.S. Equal Employment Opportunity Commission. The Ohio Rehabilitation Services Commission publishes this material for informational purposes only.

HIV accommodations also support other employees

The interviewer stands by her office window looking out over the company parking lot, shaking her head. The applicant who just left doesn't hear her muttering, half aloud, "The guy has HIV – I almost wish he hadn't told me. What the hell do I do now?"

Frequently, employers expect that people with HIV will be difficult to accommodate in the workplace. This misconception is based not on cost figures, but a lack of knowledge of available workplace accommodations and resources.

Throughout history, the disabilities most strongly associated with fear and stigma have also been the most misunderstood, incurable, and/or contagious, such as epilepsy, cancer, mental illness and AIDS. The fear and stigma of HIV can be decreased through education and experience with people who have HIV, leading to a better understanding of the disability.

Employers should also be aware that co-workers often find it difficult to deal with the episodic nature of HIV or any life-threatening disability, especially when just yesterday the person may have appeared to be healthy. Supervisors and staff need ongoing education to inform and sensitize them. A recent survey* found that 75 percent of employees wanted their employers to provide AIDS education in the workplace, while only 28 percent received it.

Accommodations may be social or functional

Many accommodations are inexpensive and require only operational changes, rather than equipment or structural modifications. Employers may be able to accommodate employees with HIV through the following emotional supports.

- on-the-job peer counseling;
- praise and positive reinforcement;
- tolerance of different behaviors;
- counseling or employee assistance programs for difficulties (stress, disability, family issues);
- allowing telephone calls during work hours to friends or others for needed support;
- substance abuse recovery support groups and one-to-one counseling;
- support for people in the hospital (e.g., visits, cards, telephone calls);
- an advocate to advise and support the employee;
- identification of employees willing to help the employee with a psychiatric disability (mentors); and
- on-site crisis intervention services or a 24-hour hotline for problems.

Employers may need to accommodate people who develop a sensitivity to light from cytomegalovirus retinitis, a viral infection of the retina, which leads to gradual blindness. Other eye infections and side effects from some medications may impair vision or increase a person's light sensitivity. A variety of infections of the brain and nervous system may damage the optic nerve. Suggestions include:

- using low-watt overhead lighting with desk lamps;
- filtering overhead fluorescent lights;
- providing printed materials with large print and good contrast;
- providing a darkened room as a rest area; and
- using computers that have color monitors with adjustable contrast and allowing 15-minute breaks from the terminal every two hours.

All employees benefit from stress reduction

Social support and *job control* are two resources that can moderate the negative impact of work-related demands and pressures on the health of all employees with or without a disability.

Social support includes help that an employee receives from social ties to people both at work and outside work. Control is the ability to exert influence over one's environment so that it becomes more rewarding and less threatening. *Job control* is the ability to influence the planning and execution of work tasks with a focus on organizing work and providing resources to help workers meet the demands of production.

Various work elements impact on employees' mental and physical well-being. Over 30 percent of adults report high stress every day, and even more once or twice a week. A 1991 Northwestern National Life Insurance study reported more than one-third of people surveyed were considering changing jobs because of job stress. The consequence of such stress is reflected in the increasing number of workers' compensation claims associated with psychological disorders. Therefore, it is critical that employers address the issues of employee mental health.

As an employer, it is important for you to create an individualized and flexible work environment for all employees. Whenever possible, adapt a work environment

resource

Portions of the above article are from "Work-site Accommodations for People with HIV" and "Reasonable Accommodations for Persons with HIV Illness." Both were written by the President's Committee on Employment of People with Disabilities and include many other accommodation ideas. Order from the President's Committee, 202-376-6200 voice or 376-6205 TTY, or from the Great Lakes Disability & Business Technical Assistance Center, 1-800-949-4ADA voice/TTY.

*The survey mentioned was funded by the Centers for Disease Control and Prevention, The Principal Financial Group and Levi Strauss Foundation

to fit a particular person, whether that person has HIV or no disability – it is safer and more efficient. To accommodate individual strengths and preferences, communicate, be flexible and provide a range of work method options. Use ergonomics and common sense as a basis for the design of individualized work stations.

So, if you find yourself staring out the window of your own interview room, wondering what your next step should be, remember you don't have to become an expert on all disabilities to make appropriate accommodations. It's not even possible. Once you are comfortable with the ADA's basic principles, you will see how they mesh with sound workplace practices that apply to all employees – particularly treating each person as an individual.

– D.C.

Sears is standing up for the act

First of all, this is *not* a commercial plug for Sears, Roebuck and Co. However, some good things have apparently been going on at Sears that must not be kept secret. A case report on the company's experiences in accommodating workers with disabilities exemplifies how the law benefits both employers and employees.

And just in time. I have grown weary of the ADA doomsayers – those negative newspaper articles or "investigative/entertainment/news" programs on television which assail the many abuses of the law. Are these valuable exposes? Rarely.

They're too easy. Pick a law (most any will do) and report on every outrageous case of abuse you can find, regardless of how small a view of the whole picture it might represent. Then conclude that the law is a complete perversion, proving once again that all government is useless at best, destructive at worst. Too easy. And not accurate.

The rest of the story needs telling – workplace accommodations can be and have been done that do not bankrupt the treasury. These accommodations create and retain valuable employees. We've heard these claims over and over, but now there is new evidence to back them up. The Annenberg Washington Program in Communications Policy Studies of Northwestern University has published *Communicating the Americans with Disabilities Act, Transcending Compliance: A Case Report on Sears, Roebuck and Co.* It is highly recommended reading.

Perhaps the language of the law does a disservice to some purposes. Employers have always provided some reasonable accommodations, but usually thought of it simply as "retaining valuable staff." Unfortunately, reasonable accommodation sounds like something new and scary, no doubt expensive. On the contrary, the accommodations at Sears for the period 1978-1992 reveal the following, taken directly from the Annenberg report:

Total number	436	(100%)
Required no cost	301	(69%)
Cost less than $1,000	122	(28%)
Cost more than $1,000	13	(3%)

Average cost per accommodation – $121.42

Most striking is the finding that almost all accommodations at Sears (97 percent) require little or no cost. In fact, if you subtract those 13 accommodations costing $1,000 or more, the average cost drops to $36.01 for the remaining 423. Such accommodations include flexible scheduling, longer training periods, back-support belts, revised job descriptions, rest periods, enhanced lighting, adjusted work stations and supported seating.

Sears CEO Edward Brennan expresses it this way: "Over the years, Sears developed a corporate culture that said, 'Do the right thing for our customers and employees.' We've never had a formal program to deal with employing people with disabilities. We give jobs to people who can do those jobs. We don't focus on what people can't do. We focus on what they can do."

Sounds too good to be true, doesn't it? Undoubtedly any organization the size of Sears has had some failures, but these results are persuasive. Consider the last of "Five Core Implications for the 21st Century," outlined in the Annenberg report's concluding section: *"Far from creating onerous legal burdens, the ADA can provide employers and employees with a framework for dispute resolution and litigation avoidance, not the explosion of litigation that some observers predicted."*

Most striking is the finding that almost all accommodations at Sears (97 percent) require little or no cost.

Sears' has had only six ADA-related employee lawsuits, this out of a total workforce with disabilities estimated at 20,000. The report suggests that this extraordinary record results from the "do-the-right-thing" corporate culture and a formal commitment to alternative dispute resolution, which uses mediation to resolve disagreements.

Sears' experience with accommodations and the corporate philosophy described above, along with many other valuable insights included in the report, deserve to be shared with a wide audience. Though based on only one company's history, this report offers a glimpse into the future of ADA that, despite today's politically fashionable negativism, looks surprisingly bright.

This report and other Annenberg publications are on the internet at: http://www.annenberg.nwu.edu.

– D.C.

In the Blink of an Eye

What business leaders still don't understand

By Jasen M. Walker, Ed.D., president and director of services, and Fred Heffner, Ed.D., director of program development, CEC Associates Inc., a disability management and prevention company with locations in Pennsylvania and Florida.

There are those of us who are visually impaired, and there are those who cannot see, even with perfect vision. Who is to say who has the greater social handicap?

Corporate America still does not get it! Corporate America does not understand the real power of the Americans with Disabilities Act (ADA). The obliviousness of business leaders to the ADA may be the result of limited experience with individuals who have disabilities. Without requisite experience with individuals who are physically or mentally challenged, corporate decision-makers will not understand. They cannot understand. They will be unable to see the true value of the ADA.

Putting it in Perspective

We recall vividly an event that we think illustrates the point. It occurred in September of 1991; a beautiful summer evening in Orlando, Fla. We were there to deliver an ADA presentation to a group of risk managers. They had gathered to discuss how their organizations might control workers' compensation and other insurance-related costs.

Just after the customary business meeting but before our presentation, the president of this association introduced one of its members who had requested special time to address his colleagues.

Harry, a risk manager for over 30 years and a member of this particular association for 20 years, stood up to say good-bye to the group. He announced that he had carcinoma and his colon cancer was now invading other organs. The cancer was, in fact, killing Harry. But he wanted his associates to know that he loved his work. He shared his warm regard for them and conveyed that if "by chance" he did not make it back to Orlando for the next year, he would truly miss them. In a selfless moment, Harry genuinely encouraged everyone, particularly the older men in the group, to have annual colorectal examinations. He lamented that he had not.

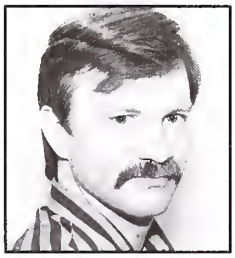
But Harry ended his shocking disclosure and tearful good-bye with reporting that **his employer had proposed separating him from work; putting him out "on disability,"** as was the organization's policy. He most regretted this, he said, because he truly wanted to work. He knew he had the strength to do so. Harry feared the thought of being removed from work only to go home and wait for death. Harry quietly dismissed himself. The room was stone silent. Torn between the tragedy of Harry's message and our egocentric desire to take advantage of the "teaching moment," we proceeded to the lectern.

With suddenness that mocks the blink of an eye, biomechanical forces can crush the cervical vertebrae of an auto accident victim .... a blood vessel in your head can burst.... a normal cell can become malignant. None of us are immune to events that can permanently change our individual worlds....

To this day, we are not sure if anyone really heard our message at that meeting. It was hardly any time for the people in the room to use their cerebrums; our hearts still went out to Harry. But Harry's message was our message too. In the blink of an eye, the importance of the ADA had hit home to a man who for 30 years had been making decisions about the re-employment of injured and ill workers. In the blink of an eye, the real power of the ADA also hit home for us, the so-called "experts."

The "blink of an eye," a unit of time measured roughly as .06 seconds, has both spiritual significance and practical implications. Theologians tell us that in this brief period of time, conception takes place, and a new generation begins. In the blink of an eye, we lost John F. Kennedy. And the world changed. In the blink of an eye, Jim Brady's life was changed.

With suddenness that mocks the blink of an eye, biomechanical forces can crush the cervical vertebrae of an





auto accident victim and cause a driver or passenger permanent paralysis. A blood vessel in your head can burst in the blink of an eye and leave you hemiplegic, unable to use your dominant hand ever again. In the blink of an eye, a normal cell can become malignant. None of us are immune to events that can permanently change our individual worlds in ways that we cannot imagine or see, all in the blink of an eye.

It took the American public over 17 years (the time it takes to blink one's eye billions of times) to bring portions of the Rehabilitation Act into the private sector. From all appearances, it will take many years more to change organizational behavior so that the ADA and its concepts are fully embraced and practically implemented.

We have heard business leaders give many reasons for why their companies have not yet embraced either the spirit or the practical aspects of the ADA. Some executives tell us that the law is too vague. Others suggest that they will wait for court decisions to refine the ambiguities in the act, and some even imply they plan **not** to change until some action is brought against them!

Some business leaders have relegated ADA policy-making to their human resource departments, ignoring the potential that the ADA has to significantly impact comprehensive risk and medical costs for the company. Unfortunately, nearly all business executives and managers with whom we have consulted rely heavily on the input of lawyers to shape their response to the whole issue of employing individuals with disabilities. Rather than making a top-level decision to be pro-active in reaching out to the pool of qualified applicants and/or workers with disabilities for their companies, they rely on the advice of counsel for ways to protect themselves against possible exposure to such individuals.

Anyone empowered to make ADA compliance company policy must fully realize that they themselves are but a blink of an eye away from needing the protection that the ADA affords everyone.

It is important to remember that virtually every American, regardless of race, ethnic background, educational level, income or power to make corporate policy, has or will have some direct connection to people with disabilities. Therefore, **all** of us have a personal interest in assuring equal employment opportunities for Americans with disabilities. As we age, we have a 25 percent chance of becoming physically or mentally challenged. Should we, during our work lives, experience an alteration in our functional capacities, we would want ADA protection.

Speaking in 1987, syndicated columnist George Will emphasized the universal importance of ensuring equal opportunities for disabled persons: *The most striking fact about the [disabled population] is that it is the most inclusive. There is a sense in which we live in the antechambers of the handicapped community. I will never be black and I will never be a woman. I could be handicapped on the drive home tonight.*

Although his language may not be politically correct, it is obvious that George Will realizes what we want most business executives to understand – that they too potentially can require the protection of the ADA. As individuals committed to enhancing the general public's awareness of issues related to people with disabilities, particularly full employment, we must constantly remind corporate decision-makers of Mr. Will's awareness.

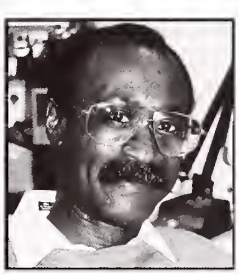
Back in 1991, when we were the recipients of the risk manager's profound lesson to all of us, there was much ado about the ADA. Soon the fuss subsided. Business leaders eventually stopped attending seminars, and unfortunately, they ceased considering implementing change in their organizations. Managers are now waiting for lawsuits and court decisions to force their hands. Unfortunately, we have never been successful in this country in either legislating or litigating morality. Effective change will not come through the courts.

Corporations will respond when we show them the considerable cost benefits to employers who comply with the ADA. Organizations can save enormous sums of money by hiring qualified people who want to work. Companies can reduce the total cost of workplace disability by returning people to gainful activity with "reasonable accommodation." Companies must forego the so-called "light duty" mentality, the insidious welfare equivalent of "making work for others," and provide job modifications of essential functions based on an individual's residual capabilities and strengths rather than focusing on weaknesses.

Risk managers and human resource people can be encouraged to cooperate and vocationally rehabilitate employees with impairments, regardless of the source of those impairments (i.e., work-related or not). But, until corporate board members and top-level executives understand what George Will and Harry, the risk manager, understood, we will have made little progress in actualizing Title I of the ADA. Our mission is to help those business leaders see – in the blink of an eye.

From *In the Mainstream*, March/April 1995




Direct Threat

There is a persistent myth that the ADA is an employment law, that it requires the hiring or retaining of people with disabilities without regard to their suitability for particular jobs. In fact, people with disabilities occasionally ask me to use the ADA to get back jobs they recently lost. No wonder some employers believe they have no choice.

But that is not the case. ADA's purpose is to remove discrimination so that people with disabilities have an equal opportunity to compete for and perform in jobs. Nevertheless, employers may still require as a qualification standard that employees not pose a "direct threat" to the health or safety of co-workers or themselves.

Making the determination

The federal Equal Employment Opportunity Commission (EEOC) has stated that an employer should be able to show all of the following about the risk that a particular person presents:

- **high probability of substantial harm** – *Is there considerably more than just a slight risk?*
- **specifically identified risk** – *What exactly is the risk? How long will it last? How severe would the harm be? How likely is it to happen?*
- **current risk** – *Does this risk exist now? Is it speculative? Remote?*
- **objective evidence** – *Is this determination being made on impartial information? (In other words, has it avoided unfounded assumptions, fears, stereotypes or patronizing expectations about a person's endangering himself or herself?)*
- **reasonable accommodation** – *Is it possible to reduce the risk to an acceptable level?*

So what does all this mean? To avoid risk, an employer must take this determination seriously. EEOC's own words to describe the above criteria state that an employer must meet "very specific and stringent requirements" to establish direct threat. Yet their guidance, for all its length, is somewhat less than specific. So the primary ADA principle needs to be applied here just as it does throughout the ADA – every situation must be viewed individually, case by case.

Man who is insulin-dependent should continue as driver

A policy that prohibits insulin-dependent diabetics from operating motor vehicles on public highways violates the ADA, the U.S. District Court for the Western District of Oklahoma has held in *Sarsycki v. United Parcel Service*. After he was diagnosed as having insulin-dependent diabetes, Sarsycki was transferred from his position as a full-time package car driver with United Parcel Service (UPS) to a part-time car washer job. He contended that UPS' refusal to allow him to maintain his driver job violated the ADA. The court agreed.

UPS argued that its policy was required by the Department of Transportation (DOT) regulations. The court rejected this argument, concluding that the regulations barring insulin-dependent diabetics from driving motor vehicles do not apply to vehicles under 10,000 pounds, such as the one that Sarsycki drove. UPS also contended that its policy was justifiable based on the same safety concerns behind the DOT policy. The court rejected this contention because UPS had failed to show it had either conducted an individualized assessment of Sarsycki's abilities or determined that he posed a direct threat to the health and safety of others. The court concluded that Sarsycki should be returned to his previously held driver position with the reasonable accommodation that food be within his reach in the vehicle and that he carry neither passengers nor hazardous materials.

From *ADA Compliance Guide* © 1994

In the courts

Waiver denied for truck drivers

Three truck drivers who are deaf are not entitled to a waiver of the Federal Highway Administration's (FHWA) requirement that interstate drivers of commercial motor vehicles be able to hear, the U.S. Court of Appeals for the District of Columbia Circuit has ruled in *Buck v. U.S. Dept. of Transportation*. According to the court, the drivers applied to the FHWA for waivers of the hearing regulation, arguing that the regulation violates Section 504 of the 1973 Rehabilitation Act by excluding individuals with disabilities on the basis of an absolute standard, rather than allowing for individualized assessments of their ability to drive a truck safely.

Denying the drivers' petitions for review of the agency's decision, the court cited a provision of FHWA regulations stating that a person is "physically qualified" to drive if, among other things, the person "first perceives a forced whispered voice in the better ear at not less than five feet with or without the use of a hearing aid." Once an individual has admitted that he cannot meet that standard, "the Rehabilitation Act does not forbid the application to him of a general rule," the court said.

The proper forum for the drivers to obtain relief is the FHWA in a proceeding to modify or repeal the rule itself, the court said, noting the agency is conducting such a rule-making. Moreover, the court said, the Mo-

Blanket policies

Do away with blanket policies. An EEOC lawyer once stated that "almost every blanket policy will be illegal." Some examples are: A person with cerebral palsy can't perform lab work. A person with epilepsy can't drive a fork lift. A person with mental illness can't do deadline-intensive publishing.

An employer with a policy (or even an informal practice) that resembles any of these examples is taking an unnecessary gamble. A Michigan employer found out the hard way when it abruptly fired a new employee after learning he had epilepsy. The evidence in the case showed that the man had not had a seizure for over 10 years. A court found the employer guilty of discrimination and levied a stout fine.

Objective evidence

Employers must make reasonable judgments based on the most current medical/psychological knowledge and the best available objective evidence. Sources can include:

- the person who has the disability (including information about experience in previous jobs);
- health professionals (doctors, psychologists, physical or occupational therapists); and
- others with expertise in the disability or with direct knowledge of the individual (such as rehabilitation counselors).

Threatening behavior

Here is the EEOC's complete, official guidance on this subject:

Where [sic] the psychological behavior of an employee suggests a threat to safety, ***factual evidence*** *of this behavior also may constitute evidence of a "direct threat." An employee's violent, aggressive, destructive or threatening behavior may provide such evidence.*

There is no intent within the ADA to require employers to forgive violence or even threats in the workplace. Despite that, when a disability is present along with such behaviors, an employer will be concerned about legal liability under the ADA. So the best advice to an employer is this: Don't jump to conclusions. Thoughtfully and carefully consider the questions listed under "Making the determination" on previous page. Seek counsel from experts.

Please see "Discipline of workers who break conduct

tor Carrier Safety Act specifically forbids the FHWA from waiving any of its regulations without "evidence" that doing so "is consistent with the safe operation of commercial motor vehicles." The court concluded the FHWA was not unreasonable in refusing to grant individual exceptions to an established safety rule.

From BNA's *ADA Manual* © 1995

Termination of guard with one hand violated ADA

Disabled license applicants must be given consideration on a case-by-case basis to accurately determine what risks, if any, they pose to themselves or the public, the U.S. District Court for the Western District of Missouri has held. This case is *Stillwell v. Kansas City, Mo., Board of Police Commissioners*.

Jimmie Stillwell, who has only one hand, had been licensed and registered with the Kansas City Police Department as a private security guard with authority to carry a firearm. In 1992, his application for licensing was denied because the Kansas City Board of Police Commissioners assumed that with only one hand he could not perform the duties of a police officer.

The board contended that two hands are required to successfully perform such defensive tactics as handgun retention, lateral vascular neck restraint and handcuffing. It also maintained that a one-handed guard is more likely to use deadly force than a guard with two hands. Stillwell argued that the board's blanket prohibition on all one-handed applicants violated Title II of the ADA. The court agreed, finding that "the board's broad-sweeping rejection is based solely on an impermissible stereotype."

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Asthma disqualified firefighter

A Maryland district court has ruled on a summary judgment motion filed in an action by a firefighter recruit who alleged that a county refused to hire him as a full-time firefighter because he has asthma.

The recruit attended sessions at the fire academy, but often became incapacitated during physical exercises. In *Huber v. Howard County, Maryland*, the court found that the county did not act unreasonably when it refused to allow the recruit to use an inhaler during training exercises. The county had legitimate safety concerns about the inhaler, since it could not be used or stored near an open flame. The county was also concerned with how the recruit could use an inhaler at a fire scene, given all the equipment that a firefigher wears. In addition, it would impose an undue hardship on the county to require other firefighters to monitor the recruit's condition, as suggested by his physician. Further, providing the recruit with extra disability days would pose an undue burden on the county, as it would affect staffing and hours of the other firefighters.

The court entered summary judgment for the county.

From *Disability Compliance Bulletin* © 1994

rules discussed" on next page for remarks by former EEOC policy attorney David Fram.)

Food handling

The concept of direct threat includes the following specific provision: A person with an infectious disease that is transmittable through handling food must be accommodated, when possible, to remove the risk; if the risk cannot be removed, the person may be dismissed or not hired to begin with.

The Centers for Disease Control issues an annually updated list of such diseases along with information about how the diseases are transmitted. Only those diseases fit under this ADA provision. HIV/AIDS *is not* included on the list. Thus a person who is HIV-positive or has AIDS is not regarded as having a disability that prevents working in food handling jobs.

Other health and safety laws

Employers may continue to comply with other laws that set health and safety standards, although the ADA gives greater weight to federal than to state or local laws.

Federal – An employer must comply with health and safety requirements of other federal laws and does not have to show that such requirements, if in conflict with ADA, are job-related and consistent with business necessity. Even when that is the case, an employer still must attempt to make reasonable accommodation to allow a person with a disability to perform a job, as long as such an accommodation does not violate the other law.

State/local – When a state or local law excludes a person because of a health or safety risk, the employer still must assess whether the person will pose a direct threat under the ADA standard, and if so, whether a reasonable accommodation is possible that will reduce the risk. An employer may not rely on a state or local law that conflicts with the ADA as a defense to a charge of discrimination.

Conclusion

Employers need to realize that they continue to have the right to a safe workplace. They need not fear the ADA, nor be experts on disability. Help is available. They, and anyone who needs ADA information, are invited to call ADA-OHIO at (800) 784-9900 or the Great Lakes Disability & Business Technical Assistance Center at (800) 949-4ADA.

In the end, employers must make their own determinations. However, knowledgeable people at these locations can discuss the intricacies of the law, offer referrals to other experts and help them explore options.

** Mr. Fram's remarks were made in his private capacity. Although he was an attorney in the EEOC Office of Legal Counsel at the time, no official endorsement by EEOC should be inferred.*

– D.C.

In the courts

Insubordination and subpar work motivated discharge

Beverly Carrozza, who has bipolar affective disorder, was fired from her job as a clerk typist with the Howard County, Md., Department of Public Works. After being transferred within the department, she received a written reprimand for insulting her supervisor, refusing to answer work-related questions and using obscenities. On one occasion, she dumped a bag of trash on a conference table while her supervisor was having a meeting.

Carrozza alleged that her termination violated the ADA. A federal district court granted summary judgment for the county, and the Fourth U.S. Circuit Court of Appeals affirmed. Although Carrozza was disabled, she was not qualified for the job, according to the court, because she was extremely deficient in working with the office computer and maintaining acceptable standards of conduct. Moreover, the county offered Carrozza extensive training to accommodate her.

ADA Compliance Guide © 1995

No injunctive relief for doctor

A New York federal district court dismissed an action in which a physician with a history of alcoholism sought reinstatement to a high ranking position while the EEOC considered an ADA charge of employment discrimination.

In *Altman v. New York City Health and Hospitals Corporation*, the physician was relieved of his duties as a department chief after he was discovered drunk at work. He refused an offer to return as a division chief, at a lower salary and with an increased degree of supervision, and chose instead to file an administrative complaint with the EEOC. While that charge was pending, he filed a federal action in which he sought a preliminary injunction to require reinstatement to his former position.

The court acknowledged its inherent power to award temporary injunctive relief, in order to maintain the status quo, prior to the EEOC's issuance of a right-to-sue letter. However, it found that it would be improper to award the injunctive relief sought in this case. First, the physician was not seeking maintenance of the status quo; rather, he sought to alter the status quo by compelling reinstatement. Moreover, the record did not show any likelihood that the physician would succeed on the merits. Finally, the physician's argument that he would suffer irreparable harm and public disgrace if the injunction were not issued had "no weight whatsoever."

Workplace Conduct

Discipline of workers who break conduct rules discussed

Remarks by David K. Fram while an ADA policy attorney for EEOC (Fram is now with the National Employment Law Institute.)

Employers are sometimes confused about the ADA's effect on their ability to enforce workplace conduct rules. It is important to note that the Equal Employment Opportunity Commission has specifically stated that, "employers may hold all employees, disabled... and nondisabled, to the same performance and conduct standards." This means that an employer does not have to allow employees to engage in misconduct on account of disability, although an employer may have to provide reasonable accommodation so that the employee can comply with the conduct rules.

An employer can enforce its rules prohibiting an employee from using or being under the influence of alcohol in the workplace without violating the ADA, even though current alcohol users who also are alcoholics have a protected disability under the ADA. The ADA specifically states that employers may require that employees not be under the influence of alcohol in the workplace and hold an employee with alcoholism to the same performance and behavior standards to which the employer holds other employees, even if unsatisfactory performance or behavior is related to the alcoholism.

For example, suppose an employee consistently comes in late on Mondays because of weekend alcohol abuse. An employer may enforce its tardiness policy and may discipline the employee in accordance with the policy. However, he warned, an employer may *not* disparately treat a qualified applicant or employee because of alcoholism. For example, if the employer would not discipline a nonalcoholic employee for being tardy, the employer may not discipline the alcoholic employee for being tardy.

One question that frequently comes up is whether a drug addict who breaks the rules can, prior to discipline, enroll in a supervised drug rehabilitation program and claim ADA protection as a former drug addict who no longer illegally uses drugs. An argument that this person is protected by the ADA would probably fail.

Rules concerning other workplace conduct can take a number of forms, such as rules against violence, rules concerning professionalism and rules concerning tardiness, Fram said. Employers may hold all employees, with and without disabilities, to the same conduct standards. However, an employer may have to provide reasonable accommodation so that an employee with a disability can comply with the conduct rules.

Suppose that an employee has a rare, severe psychotic disorder which results in his punching a supervisor or threatening to stab a co-worker. An employer never has to condone violence – or the threat of violence – in the workplace, even if it is on account of someone's disability. An employer can discipline an employee with or without a disability who engaged in the prohibited conduct.

In the case of an employee who is violent or who threatens violence in the workplace, even if the employee's behavior is the result of a disability, an employer can argue that the individual is not "qualified" under the ADA, or that an employee poses a "direct threat" that cannot be reasonably accommodated.

Tardiness rules are sometimes violated because of an individual's disability. For example, an employee who receives cancer treatments in the morning arrives late to work. The employer can presumably discipline the employee the same way it would discipline any other employee who is tardy. However, if the employee requests reasonable accommodation, the employer must consider whether the accommodation can be provided without posing an undue hardship.

Employers commonly ask whether they must rescind discipline imposed for misconduct if the employee later requests reasonable accommodation. Probably not, because an employer generally only has to provide reasonable accommodation after it is requested. If the employee requests reasonable accommodation after having been fired for tardiness, the employer does not have to rescind the termination.

From BNA's *ADA Manual* and BNA's *Employment Discrimination Report* © 1995

Must workers who threaten violence be accommodated?

The legal implications of the ADA in situations involving workplace violence were a subject of discussion at the 1994 meeting of the American Bar Association's Section of Labor and Employment Law, Committee on Employee Rights and Responsibilities. Discussing the ADA's requirement of reasonable accommodation, attorney Craig Cornish of Colorado Springs, Colo., said that attempts must be made to find a reasonable accommodation to an employee's mental disability, even for a person whom the employer believes poses a direct threat to coworkers or others. Under the ADA, a person who is a direct threat to the safety of someone in the workplace can be terminated, despite having a disability, if the threat cannot be eliminated by a reasonable accommodation, Cornish said. Employers should try to determine how an employee's threat to others can be eliminated short of termination, he advised.

Cornish acknowledged that he does not know what evidence is required to impose a psychological evalua-

tion on an employee. Must there be some evidence that the employee might pose a direct threat of violence or possibly injure someone, he asked, or is the standard "reasonable suspicion" or "probable cause?" How imminent must the danger be? The ADA does not address any of these questions, he pointed out.

Various restrictions might be imposed on the employee, such as "ordering an employee to stop drinking, be tested for drugs or take drugs recommended by a psychiatrist, institutionalizing an employee or requiring mental-health counseling, or changing the person's supervisor," he suggested. "However, what some might call 'benevolence' looks frightening in terms of personal liberty," Cornish said.

BNA's *ADA Manual* © 1994

Substance Abuse

What you need to know about ADA and drug and alcohol abuse

NOTE: The term "drug abuse" as used in the ADA includes the abuse of legal drugs.

The ADA seems to regard drug and alcohol abuse differently. Within the act itself, the term "illegal use of drugs" is treated extensively in three separate sections, whereas the term "alcohol abuse" is discussed in only one. In EEOC's Title I Technical Assistance Manual (which rightly has become the "bible" for employment issues), the eight-page chapter devoted exclusively to substance abuse is dominated by drugs. Thus, by word count alone the ADA seems to be considerably more concerned with the illegal use of drugs than with alcohol abuse. The perception is that the two are treated differently in the law and many people have asked why.

The differences may be a reflection of how we as a society view the two problems. No one would dispute, for instance, that concern about drug abuse has become uppermost in our national consciousness. On the other hand, alcoholism is commonly regarded as a lifelong disease that one can be said to be recovering from but not cured of. And regardless of your view of alcohol, it is legal. These are some of the ways we see drugs and alcohol differently. These differences are not judgments on the relative severity or importance of one kind of abuse over the other; they simply exist. They do not explain point-by-point how variations in law came to be, but they do illustrate why there *appear* to be variations. But appearances can be deceiving.

The difference is largely one of definitions. According to the ADA, a person who is currently illegally using drugs does not have a disability, whereas a person who is an alcoholic may. However, in practice neither are protected by the law from poor performance or behavior in the workplace. As you examine the following summary of pertinent provisions, note particularly the sections about accommodations, workplace standards and discharge/refusal to hire.

Disability or not?

- **Alcohol**
  A person who has alcoholism is a "person with a disability" under the law.
- **Drugs**
  A person with a history of drug addiction who currently is not using drugs illegally may be a "person with a disability" under the law.
- **Drug addiction**
  A person who is currently illegally using drugs is not a "person with a disability" under the law.
- **Casual drug use**
  A person who casually used drugs in the past but was not addicted is not a "person with a disability" under the law.

Accommodations

A person who is currently using drugs illegally does not have a disability under the law and thus is not entitled to a workplace accommodation. However, a person who is an alcoholic or who has a history of drug abuse (but is no longer using drugs illegally) is entitled to the same consideration for workplace accommodations as a person with any other type of disability.

An example of an appropriate accommodation would be permitting a long lunch period two days a week to allow an employee to attend Alcoholics Anonymous meetings. The employer can require the missed time to be made up. In contrast, it would be inappropriate to allow an employee to come to work late on Monday mornings because of a weekend binge.

resource

Help for drug-free workplace

The Institute for a Drug-Free Workplace in Washington has published *Drug and Alcohol Abuse Prevention and the ADA: An Employer's Guide*. Despite some shortcomings, the book is well organized and should be helpful. One chapter summarizes the types of inquiries an employer may and may not make. For example, an employer can't ask an applicant, "Have you ever used drugs illegally?" but can ask, "Do you *currently* use drugs illegally?" It includes reprinted sections of the law and a table of questions addressed in the book, helping readers to find specific answers. Single copies are $32 from the Institute: 1301 K St. NW, East Tower, Suite 1010, Washington, DC 20005-3307; (202) 842-7400. Multiple order discounts are available.

In the courts

Tootsie Roll settles lawsuit based on its alcohol policy

The EEOC has entered into a consent decree with the maker of Tootsie Roll candies that grants back pay, damages and interest to a former employee with a disability who was fired for allegedly violating the company's alcohol policy. The agreement settles a suit alleging Tootsie Roll Industries violated the ADA when it fired a custodian. Under the terms of the consent decree, the discharged man will collect $19,500. He did not request reinstatement.

John Hendrickson, regional attorney for the EEOC (Chicago), said the man was fired in 1994 for allegedly violating Tootsie Roll's substance abuse policy. The man only appeared intoxicated due to drug treatment for a mental disability, Hendrickson said, but after being informed of the mistake, Tootsie Roll refused to reinstate the individual. The EEOC filed suit in federal court alleging Tootsie Roll's alcohol policy violated the ADA because it had an adverse impact on a person with a disability.

"Any policy with respect to controlled substances which casts a wide net also tends to snare people with all kinds of disabilities," Hendrickson said.

In settling the suit, the company will modify its substance abuse policy, and conduct ADA training for all managers and human resources personnel.

From BNA's *ADA Manual* © 1996

Addiction key to disability

An applicant for a police position in Petaluma, Ca., wrote on his application that he had used only "one-half ounce to one ounce total" of marijuana in his life and only a "small amount" of cocaine. Later he admitted that he was a "voluntary, casual" user and had used each drug "plus or minus 100 times." When the police department refused to hire him, the applicant filed suit under Title II of the ADA. He claimed that "disability" under the act includes "individuals who are successfully rehabilitated from their prior use and individuals who are erroneously regarded as engaging in the use of illegal drugs."

The court ruled against the applicant, citing the EEOC's Technical Assistance Manual, which states that "a person who casually used drugs illegally in the past, but did not become addicted" is not covered by the ADA. In addition, the court said, even if the applicant could demonstrate that his level of use constituted a disability, his deception during the application process justified rejecting him.

From BNA's *ADA Manual* © 1994

Workplace standards

Employees who use drugs or alcohol may be held to the same performance and conduct standards that apply to other employees.

All employees may be required to follow the Drug-Free Workplace Act of 1988 and rules set by federal agencies about drug and alcohol use in the workplace.

Discharge/refusal to hire

- **Alcohol**
  An alcoholic may be discharged or denied employment if alcohol use diminishes job performance or conduct to the extent that the person is not "qualified" – in other words, unable to perform the essential functions of the job. This is an example of alcoholism that is severe enough to constitute a disability. (See "Workplace standards" above.)
- **Drugs**
  A person who is currently using drugs illegally may be discharged or denied employment on the basis of such drug use. (See "Disability or not?" on previous page.)
- **Other disabilities**
  A person with a disability, such as epilepsy, who also is currently illegally using drugs may be discharged or denied employment on the basis of such drug use.

Drug tests

The ADA neither authorizes nor limits the use of drug testing in the workplace. A drug test is not regarded as a medical examination and thus may be administered at any stage of employment, including to applicants.

Current drug use

When it comes to drug use, employers ask one question more than any: What does "current" mean?

The law does not define "current" in weeks or months, or by any particular unit of time that has elapsed since a person last used drugs illegally. Here is what the EEOC has said in its Technical Assistance Manual:

> *"Current drug use means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem. It is not limited to the day of use, or recent weeks or days. It is determined on a case-by-case basis."*

For example, an applicant or employee who tests positive for an illegal drug cannot immediately enter a drug rehabilitation program and seek to avoid the possibility of discipline or termination by claiming to be in rehabilitation and no longer using drugs illegally. It is likely that an employer could persuasively argue that this applicant or employee is a 'current' user. A person who tests positive for illegal use of drugs is not entitled to the protection that may be available to former users who have been or are in rehabilitation.

Further, employers probably are well advised not to establish their own time frames (e.g., any illegal drug use

within 30 days of application will be considered current). Because the ADA is to be applied on a case-by-case basis, such policies would likely be seen as arbitrary and not acceptable.

Direct threat

Under ADA, employers are permitted to discharge or not hire people whose disabilities would cause a direct threat to the safety of co-workers or to themselves. Other federal laws establish standards consistent with the ADA that refer to drug and alcohol use for people holding safety-sensitive jobs. In general, however, the ADA does not allow employers to treat people with past drug or alcohol impairments any differently from other employees.

The ADA reflects society's varying views of drug and alcohol use, and acknowledges that alcohol is legal. But for employers, the bottom lines are these: ADA does not require an employer to tolerate the use of drugs or alcohol, or being under the influence of either, in the workplace. Neither does it protect individuals who are performing poorly because of either substance. An employer might be required to provide an accommodation to help an employee overcome an abuse problem, but never to forgive it.

– D.C.

Mental Health

Paranoia surrounding myths of mental illness unfounded

Here's exciting news! The Equal Employment Opportunity Commission (EEOC) recently published new figures on the impairments most often cited by people filing charges of discrimination under the ADA.

All right, maybe you have to be a serious follower of ADA news to find these statistics exciting. But there is a surprise. Emotional and psychiatric disabilities are only the third highest category, at 10.2 percent of all claims. This is unexpected because the number of inquiries I receive (both from employers and employees) about emotional and psychiatric disabilities would have led me to predict that these disorders represent considerably more than one in 10.

What's at work here? Perhaps nothing more mysterious than myth. No disability group is subject to more widely-held and fervently-held misconceptions. Five of the most common, as stated by Laura Mancuso, M.S., C.R.C., a nationally-recognized authority on psychiatric disability, follow:

1. Mental illness is uncommon.
2. Mental illness is the same as mental retardation.
3. People with psychiatric disabilities are likely to be violent.
4. Recovery from mental illness is not possible.
5. People with psychiatric disabilities can't tolerate stress on the job.

Let's look at what Mancuso says about two of these myths.

Myth #3 – People with psychiatric disabilities are likely to be violent.

Upon learning that an applicant has a history of psychiatric treatment, some employers may expect that the individual is likely to become violent. This myth is reinforced by portrayals of people with mental illnesses in movies, television and the news media as frequently and randomly violent. According to a recent scholarly review of research literature, none of the data give any support to this sensationalized caricature of people with mental disorders served up by the media. (Monahan, John. "Mental Disorder and Violent Behavior: Perceptions and Evidence," *American Psychologist*, April 1992.)

> *Mental illness is NOT uncommon. You may have someone on your staff right now who has such a history but who has recovered or learned adequate coping strategies.*

Myth #5 – People with psychiatric disabilities can't tolerate stress on the job.

This oversimplifies the rather complex human response to stress. People with a variety of medical conditions – including cardiovascular disease, multiple sclerosis, and psychiatric disorders – may find their symptoms exacerbated by high levels of stress. But the sources of personal and job-related stress vary substantially from person to person. Some find an unstructured schedule to be very stressful, while others struggle with a regimented work flow. Some people thrive on public visibility or high levels of social contact, while others need solitude to focus and be productive. Workers with psychiatric disabilities also vary in their responses to stressors on the job. All jobs are stressful in some regard. Productivity is maximized when there is a good match between the employee's needs and the job's working conditions – whether or not the individual has a psychiatric disability.

So how do employers accommodate workers with psychiatric disabilities? Simply by providing the same high-quality management that all employees want and thrive under. Such management incorporates, among other things, clearly articulated performance expectations, timely and constructive performance evaluations (including positive feedback) and easy availability to consultation during the workday. In addition, the following are Mancuso's examples of specific accommodations that might benefit a specific person in a specific situation: flexible work schedule; part-time work; physical arrange-

ments such as enclosed office space to reduce noise or visual distractions; and time during the workday to telephone supportive friends, family members or professionals.

Now, if you're an employer, perhaps you're thinking this is too difficult or too confusing. You might think you can simply avoid these difficulties by not having any employees with psychiatric histories. Think again. As an intentional practice, that's illegal; as a product of chance, it's unlikely. Mental illness is NOT uncommon (see Myth #1). You may have someone on your staff right now who has such a history but has recovered or learned adequate coping strategies. That person's health could worsen, or another employee could develop a psychiatric disability in the future. This subject is not one you can ignore. But neither is it one that should intimidate you.

For further information, request a copy of the complete four-page article by Laura Mancuso referred to here, "Employing and Accommodating Workers with Psychiatric Disabilities." It is one of a series of pamphlets developed by Cornell University (under a contract with the National Institute on Disability and Rehabilitation Research) to broaden understanding of the employment provisions of the ADA. *(See Resource, page 25.)* This pamphlet will by no means make you an expert on psychiatric disabilities, but it's a good start, and it includes a list of valuable resources you can call for further assistance.

– D.C.

In the courts

Company, not supervisors, may have violated Title I

Individual supervisors who are not decision-makers for a company may not be held individually liable under Title I, the U.S. District Court for the Northern District of Illinois has ruled. In *DeLuca v. Winer Industries*, Raymond DeLuca was dismissed by his supervisors at Winer Industries after he was hospitalized with multiple sclerosis. DeLuca sued under Title I, claiming that his supervisors and the company were liable for allegedly discriminating against him due to his disability.

In a preliminary ruling, however, the court found that only DeLuca's claim against Winer Industries could stand. Relying on *Wessell v. AIC* and other civil rights cases, the court ruled that individual supervisors could be held liable only if they are also "the employer himself.... DeLuca does not allege that the individual defendants were decision-making employees... or that the individual defendants were actually the employers themselves."

Enforcement

EEOC investigates discrimination, courts wield the power

The federal Equal Employment Opportunity Commission (EEOC) enforces Title I, Employment, of the ADA using the same procedures used to enforce Title VII of the Civil Rights Act of 1964. EEOC investigates and seeks through conciliation to resolve any discrimination found and obtain relief for the recipient of the discrimination.

For a person who believes he or she has been discriminated against, this is the priority order of actions to take:

- Resolve the conflict informally.
- If informal resolution fails, file a complaint with EEOC.
- File a lawsuit within 90 days of receiving EEOC's right-to-sue letter.

Informal resolution

The importance of trying to resolve conflicts informally cannot be overemphasized. Aside from the intangible benefits of avoiding an adversarial situation, individuals need to understand that the formal process will take too long to "save" a job that is about to be terminated or regain a job that was lost last week. As of July 1995, the average processing time by the EEOC was 13 months.

Informal resolution can include educating one's employer about individual rights and employer responsibilities. (Some employers still don't know about the ADA). A recalcitrant employer may become more reasonable when it is clear that an employee is truly ready to claim his or her rights.

Filing a charge of discrimination

When informal attempts have failed, then a person may file a complaint with the federal EEOC. In fact, this step *must* be taken before a person can file a lawsuit. Complaints must be filed within 180 days of the alleged act of discrimination or of the date the complainant first knew of the discrimination. When the EEOC believes there has been discrimination, it will attempt to resolve the issue through conciliation and to obtain full relief consistent with the EEOC's standards for remedies.

In mid-1995 the EEOC announced a change in its approach to investigating charges of discrimination. Whereas the original intent was to investigate every complaint, now only those that appear to have merit will be investigated. All other charging parties will receive *right-to-sue* letters. The results of the change are uncertain because it is not yet clear what it means to "have merit."

People who believe they have been discriminated against may initiate a complaint in person, by telephone or by mail: EEOC Cleveland District Office, Tower City - Skylight Office Tower, 1660 W. Second St., Room 850, Cleveland, Ohio 44113-1454; (800) 669-4000.

Copies of the complaint form are also available at the Columbus office of David Cameron, ADA coordinator, Ohio Rehabilitation Services Commission. Call 1-800-282-4536, ext. 1232.

Filing a lawsuit

The EEOC's determinations that discrimination has occurred carry weight and may influence negotiations with employers, but these determinations do not have the authority of a court decision. Under ADA, only after the EEOC issues a right-to-sue letter can a person proceed to court. The EEOC will issue a right-to-sue letter if:

- its investigation shows there was no discrimination;
- its investigation shows there was discrimination, but conciliation efforts have failed and the EEOC has decided not to sue on the charging party's behalf; or
- it has decided not to investigate the complaint.

Regardless of what EEOC decides, it must issue the letter within 180 days after the original filing date. Thus, a letter requested after 180 days have passed will be sent immediately. However, a letter requested before 180 days have passed will be sent earlier only if EEOC can certify that its processing will not be finished within 180 days. A lawsuit must be filed within 90 days after receiving the right-to-sue letter.

Advice to individuals on filing a charge

The best advice about filing a complaint has always

Mediation is cheaper, faster than meeting in court

By Shelley Whalen, executive director, Community Mediation Services of Central Ohio, and president, Ohio Mediation Association

Throughout the country, and especially in Ohio, a new awareness is emerging that the courthouse is not the best or only place to turn for help when disputes arise over issues of equitable access to goods, services and employment involving people with disabilities. In fact, the ADA recommends mediation as a more effective alternative.

People who opt for mediation receive the services of a skilled, impartial facilitator who can help them sort out their respective points of view and search for a mutually satisfying settlement that addresses the most critical needs of everyone involved. The process allows participants to avoid the delay, expense, public relations damage, and low employee morale and productivity that are often associated with lengthy, adversarial litigation.

Mediation offers other benefits. Unlike a judge in a legal proceeding or arbitrator in an administrative hearing, a mediator does not decide who is right or wrong in a conflict or render a decision as to the specific terms of a settlement between parties. Therefore, the process allows disputants to maintain their right to decide independently whether a voluntary agreement is possible and if so, what the specific terms of their settlement will be.

When a dispute involves a person with a disability, mediation can be applied in many contexts. The process can be used to select a "reasonable accommodation" that is both acceptable to an individual, and practical and cost-effective for the employer or provider of goods or services. Mediation can also be used to resolve allegations of discriminatory hiring practices or appeals stemming from the denial of disability benefits. Rehabilitation service providers and their clients may even find the process useful in helping them reach agreement on the content of clients' individual written rehabilitation plans.

It is common for a complainant to request mediation before filing a formal complaint with the Civil Rights Commission, EEOC, or the Department of Justice, Mediation may also be requested by either a complainant or a responding party in a conflict and undertaken at virtually any point during which a dispute remains unresolved. If, in the worst case, parties are unable to reach a voluntary settlement during negotiations, they are each free to resume the pursuit of a legal or formal administrative ruling on their dispute.

An increasing number of mental health professionals, human resource management consultants and attorneys in private practice are getting trained in both mediation techniques and ADA compliance, so that they may offer this valuable service to people with disabilities, businesses and divisions of government. In addition, many communities around the state have established or are in the process of establishing publicly subsidized, non-profit mediation centers in order to make these services available on a sliding fee scale.

Instead of embracing the familiar "see you in court" mentality, you may be able to resolve issues more quickly and at less expense if you choose to "meet at the mediation table."

Contact Shelley Whalen at (614) 228-7191 or the Ohio Commission on Dispute Resolution and Conflict Management at (614) 752-9595 for a statewide directory of non-profit dispute resolution organizations and information on mediation training for professionals. Or contact your local bar association's Alternative Dispute Resolution Services representative or look for Mediation Services in the Yellow Pages.

been to be as complete as possible. That advice is more important now than ever. Keep every piece of paper that relates to the problem – notices from the employer, doctor's statements, even telephone message slips – anything that contains pertinent information and that helps establish the sequence of events. When no such documentation exists, even your own written summary of a meeting or phone conversation may be helpful, especially when it is recorded shortly after the event.

If the EEOC decides to investigate a complaint, it will eventually need all that information. Starting out with a complete picture of all events surrounding an act of discrimination may increase the likelihood that the EEOC will investigate. We don't know for certain that this will make a difference, but a complainant needs to do whatever is possible to improve his or her chances.

The number of cases that the EEOC itself actually litigates is extremely small – less than one-tenth of a percent of all complaints. Because the resources for taking cases to court are so limited, the EEOC intends to prosecute only those complaints that would be precedent-setting or that appear to have national importance. Many people with disabilities will have to secure their rights not through the EEOC, which is slow but free, but through the judicial system, which is slow and expensive.

The EEOC's determinations that discrimination has occurred carry weight and may influence negotiations with employers, but these determinations do not have the authority of a court decision. Only after the EEOC issues a right-to-sue letter can a person proceed to court.

Advice to employers on good faith effort

The often-overlooked Section 102(a)(3) of the Civil Rights Act of 1991 provides the following:

> *"...damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business."*

In other words, an employer's efforts to accommodate an employee may fail – for example, an effective accommodation was not located or, if located, was determined to be an undue hardship. Still, an employee may file a complaint with the EEOC, who may conclude that discrimination did occur despite the employer's attempts. The remedy may be that the employer must provide the accommodation anyway, but the employer will not be liable for damages as well.

Since I am not an attorney, I avoid giving legal advice. However, I will pass on advice that I heard an attorney give in response to an employer's question about good faith effort. The attorney referred the questioner to the EEOC's suggested four-step process for determining reasonable accommodation, as presented on page 22.

1. Analyze the job and determine its essential functions.
2. Determine the employee's abilities and limitations (in consultation with the employee).
3. Identify potential accommodations and assess their effectiveness (in consultation with the employee).
4. Choose the accommodation that serves the needs of both the employee and the employer (after considering the employee's preference).

The statute does not define good faith effort. In view of that, the attorney's advice was this: even though using this process is not required by the law, if an employer is going to conclude that no accommodation is possible, it would be wise for that employer to document and be able to show that the four-step process was followed, in case any questions should ever be asked. This would not be guaranteed evidence of good faith effort, but its absence might reasonably be construed as evidence that there was no such effort.

– D.C.

Enforcement of Title I of the ADA occurs through the U.S. Equal Employment Opportunity Commission. The Ohio Rehabilitation Services Commission publishes this material for informational purposes only and cannot pursue claims of discrimination on behalf of people with disabilities. RSC can assist in educating employers on their responsibilities and employees/applicants on their rights. Call toll-free in Ohio at (800) 282-4536, ext. 1232, or at (614) 438-1232.

Coordination with Other Laws

Workers' Compensation

When is a disability not a disability?

From articles by law partners Steven V. Modica and Lonny H. Dolin of New York, and attorney Gary Phelan of Connecticut

Many people believe that they are "protected" by the Americans with Disabilities Act if they are considered permanently or partially disabled under workers' compensation (comp) or another insurance program. This is untrue, and it is one of many misconceptions about the interplay between the ADA and workers' comp.

"Don't return to work until you're 100 percent." "Come back when you don't have any medical restrictions." These all-too-familiar responses have frustrated many injured workers caught in the workers' comp maze. Workers who have been injured and then denied accommodation for the resulting disabilities may file claims against employers under the ADA.

Workers' comp laws provide wages and medical care for injured employees. The right to benefits depends only on whether the injury was work-related, regardless of negligence or fault. In contrast, the ADA is based on fault and imposes stringent penalties on employers that intentionally discriminate. Despite their differences, the ADA and the workers' comp system intersect at several points.

Neither receiving workers' comp benefits nor being classified as permanently disabled for workers' comp purposes will automatically establish coverage under the ADA.

The ADA prohibits employers from conducting preliminary medical examinations of job applicants or asking about the existence, nature or severity of a disability. The Interpretive Guidance materials accompanying the Equal Employment Opportunity Commission's ADA regulations also prohibit employers from asking about an applicant's workers' compensation history *before* making a job offer. However, employers may ask applicants (1) whether they are able to perform a job-related function and (2) how they would do so, with or without a reasonable accommodation.

The post-offer stage is triggered when the employer makes the applicant a job offer contingent on the applicant's participating in a medical examination or inquiry. Before employees start work, the employer may explore their workers' comp history through a medical inquiry or examination, so long as all applicants in the same job category face the same scrutiny. Employers may use this information to verify employment history,

The ADA does not prohibit an employer from acquiring information about preexisting injuries. However, the employer can seek this information only after conditionally offering employment and only if all applicants are subject to the same inquiry.

identify applicants who have filed fraudulent workers' comp claims, and give the government information required by state laws regulating workers' comp and "second injury" funds. (Second injury funds provide financial incentives to employers who hire people with prior work-related disabilities.) The information may also be used to identify applicants who would pose a direct threat to their own or others' health and safety on the job unless the threat could be reduced or eliminated by a reasonable accommodation. Employers may not reject an applicant with a disability on the basis of medical information just because they think that hiring the person might raise their workers' comp costs.

Many states bar workers from receiving benefits if they intentionally gave false medical information during hiring interviews. The ADA preserves this ground for disqualification. Employers may fire or refuse to hire people who knowingly provide a false answer to a lawful post-offer medical inquiry.

Employers may require that employees be examined to determine their ability to perform essential job functions. For instance, when an injured employee wants to return to work, the employer may require a job-related medical examination, but not a full physical examination. The employer cannot refuse to let injured employees return to work unless they either could not perform the job's essential functions even with a reasonable accommodation or would pose a significant risk of substantial harm that could not be reduced to an acceptable level through accommodation. A medical exam may be necessary to determine a suitable accommodation for the employee's old job or for a vacant job offered as an accommodation.

Neither receiving workers' comp benefits nor being classified as permanently disabled for workers' comp purposes will automatically establish coverage under the ADA. A person with a disability who can perform a job's essential functions if accommodated will be considered a "qualified individual with a disability" who is entitled to ADA protections. Many workers will not meet the ADA's definition of disability because either their injuries cause only temporary, non-chronic impairments or their permanent injuries are not severe enough to "substantially limit" a major life activity.

Workers who have disabilities will be considered quali-

fied for a job if they (1) have the needed skills and experience and meet other job requirements and (2) can perform the job's essential functions with or without reasonable accommodation. Identifying which job functions are essential will play a vital role in workers' comp cases affected by the ADA.

The heart of the ADA lies in the reasonable accommodation requirements. Refusing to accommodate a worker with a disability violates the ADA unless the employer can show that the accommodation would impose an undue hardship on the business. Assignment to light-duty work should be considered only when it would be unreasonable or impossible to accommodate the employee in the position as currently described.

If a suitable light-duty position is vacant, an employer might be required to assign the worker to it as a reasonable accommodation. If the vacant job was created as a temporary position, the reassignment may be temporary. If a new position is offered, the employee should be qualified for it and the job should be equivalent to the original job in pay, status, location and working conditions.

Whether the worker is "otherwise qualified" for a light-duty position will be determined in relation to the new position, not the old one. The employer might be required to provide a further accommodation to enable the employee to do the new job.

The ADA was intended to supersede conflicting state workers' comp laws. For example, the ADA preempts state laws that prevent employers from letting injured workers return to work if they risk future injury. Workers' comp exclusivity provisions do not preclude ADA claims.

As mentioned, the ADA does not prohibit an employer from acquiring information about preexisting injuries.

Employers who refuse to take injured workers back until they are "recovered" or "100 percent" will probably be unable to take advantage of the good-faith efforts defense.

However, the employer can seek this information only after conditionally offering employment and only if all applicants are subject to the same inquiry.

Employers may defend against ADA charges by showing that the disabled workers would have posed a direct threat to their own or others' health or safety. Employers cannot reject people with disabilities merely because hiring them would slightly increase the risk of injury. The disability must give rise to a "significant risk" of injury or a "high possibility" of substantial harm. The direct threat defense focuses on the worker's present ability to safely perform a job's essential functions. Evidence of future risk and higher benefits costs for the employer will not suffice.

resources

Answers to workers' comp, ADA connection published

The ADA has introduced a whole new set of variables into a workplace already loaded with workers' compensation complexities. "The Workers' Compensation–ADA Connection: Supervisory Tools for Workers' Compensation Cost Containment That Reduce ADA Liability" attempts to answer questions of interaction between the two laws.

Why is this relationship so important? Some of the reasons are legal. For instance, although both systems deal with disability, they do not always cover the same people. Other reasons, as the book points out, are more philosophical: "Negative attitudes toward injured workers can make them into individuals with disabilities, creating ADA liabilities for an employer." The two systems can even operate in conflict, as the authors state:

"The ADA requires that employers consider what a person with a disability can do, not just what [the person] cannot do. The key to ADA compliance is to make all employment decisions based on an understanding of the abilities of the persons with an impairment and not solely on an understanding of their limitations.

"The workers' compensation system (appropriately) evaluates impairment and loss of functions. It is only by doing this that benefits can be fairly paid. The problem arises when employers depend totally on these kinds of evaluations to make return-to-work decisions."

The book describes the current workers' compensation situation in straightforward language and defines relevant terms. One of the book's strengths is its clear delineation of ADA provisions. It's available for $29.50 from Milt Wright & Associates, Inc., (800) 626-3939. – *D.C.*

EEOC adds to its ADA manual

In September 1996, the EEOC issued *Enforcement Guidance: Workers' Compensation and the ADA* to set forth the commission's position on the interaction between ADA Title I and state workers' comp laws. The 25-page document discusses direct threat, light duty, reasonable accommodation, reassignment and many other issues in a question and answer format. It should be filed in your ADA Compliance Manual.

Contact the EEOC Publications Information Center, P.O. Box 12549, Cincinnati, OH 45212-0549; (800) 669-3362 voice or (800) 800-3302 TTY.

Employers may also defend against an ADA claim by showing that accommodating the disability would have caused an "undue hardship." Theey must show that the accommodation would have posed a "significant difficulty or expense" in light of business size, financial resources and overall impact on the facility. An employer that denies an employee's accommodation request must be able to show that the proposed accommodation was not reasonable.

Employers can also avoid liability by showing that they made "good faith" efforts to accommodate the disability. They will have to prove they tried to "identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business." Employers who refuse to take injured workers back until they are "recovered" or "100-percent" will probably be unable to take advantage of the good-faith efforts defense.

In the courts

No disability found to limit woman's ability to work

A former sheet metal worker with carpal tunnel syndrome is not disabled under the ADA, since she is not restricted from holding a broad range of jobs, a federal district court in Kansas ruled in *Lamury v. Boeing*.

The employee was advised by a doctor not to use power tools, to avoid repetitive arm activity, and to lift no weights over 30 pounds. She worked at light-duty jobs for a year, until the company discontinued its light-duty policy. Eventually, the company laid her off, determining she could not perform the essential functions of her job.

The employee sued the employer under the ADA, claiming her disability was based on impairment in the major life activity of working. The court found that she had no disability. She was not disqualified from a wide range of jobs, the court said; in fact, she had been employed in a variety of jobs since her impairment. Moreover, the court agreed with the employer that the employee should be barred from contending that she could work at other jobs within the company, since she received a $45,000 workers' compensation settlement. In her compensation claim, the employee had testified that there was no job she could perform at the company because of her medical restrictions.

From BNA's *ADA Manual* © 1995

Wellness Plans

Plans tied to insurance programs could run afoul of the ADA

Composed of elements such as smoking cessation programs, stress management classes and lunchtime aerobics, most wellness plans can be a boon to the overall health and productivity of a company's workforce. They are becoming increasingly popular in businesses, but if improperly administered, wellness programs could raise red flags with the ADA. The ADA does not prohibit voluntary wellness programs that do not discriminate against anyone, disabled or not, who chooses not to participate. In fact, the Equal Employment Opportunity Commission, in its technical assistance manual, says employers can conduct voluntary wellness and health screening programs, provided:

- participation in the program is voluntary;
- information obtained about an individual's health is kept confidential; and
- the information obtained is not used to discriminate against an employee.

What is voluntary?

A voluntary wellness program is one in which an employee can choose whether to participate with no ill consequences. This may seem obvious, but companies eager to implement a wellness plan should avoid offering any incentive that may negatively inpact workers who choose not to participate. For example, offering a financial incentive could be risky. The higher the incentive, the more pressure there would be to join. Leaning on middle management to produce numbers in a program could tempt managers to coerce their staff members to participate with threats or financial *dis*incentives.

Wellness programs and benefits packages

Even if a wellness program is voluntary, trouble with ADA compliance may follow if a company constructs a program that can affect participants based on their health status. In fact, many companies have connected their wellness programs to their health insurance benefits packages.

"Smart companies will plug their wellness programs into health insurance because, if you pay for the prevention up front, you save money at the other end through reduced claims," a spokesperson for the Wellness Councils of America (WELCOA) said.

By doing so, companies create a plan in which participants must meet certain "wellness criteria," such as having weight, blood pressure or cholesterol levels in an acceptable range for their age and height, not smoking, not abusing alcohol or drugs, agreeing to scheduled medical screenings or wearing seat belts when driving.

If they meet the criteria set out in the wellness plan,

participants may have their deductibles lowered or waived or receive extra benefits allocations, such as more vacation time or an upgrade of health coverage. On the other hand, employees who do not meet wellness criteria could end up paying more for insurance or losing benefits. Companies should beware. Basing benefits on an employee's health status can be tricky because the ADA requires employers to provide benefits without regard to disability. For example, creating a wellness plan that requires participants to wear seat belts when driving to qualify for a certain bonus could discriminate against a blind employee. Penalizing an employee with serious heart disease for not meeting a cholesterol-level requirement could also create problems.

Basing benefits on an employee's health status can be tricky because the ADA requires employers to provide benefits without regard to disability.

One way to work around this dilemma is to incorporate the ADA'S requirements to accommodate the known disabilities of otherwise qualified employees. Modifying a wellness plan as a reasonable accommodation could be one way to avoid violating the law while still offering the plan. "Reasonable accommodation applies to every aspect of employment, including the provision of benefits, and that would include wellness programs," said Sibyl Pranschke, a St. Louis attorney who specializes in employee benefits. "Employers just have to take a common sense approach in this area. Wellness programs tied into insurance should simply state that people with disabilities will have to request reasonable accommodation within [the] wellness plan."

Indeed, the ADA doesn't require companies to do things that don't make sense, said Daniel R. Thomas, associate director of insurance products at the Health Insurance Association of America (HIAA). "Employers need to make their wellness program flexible or be able to modify them to accommodate an individual," he said.

Chrysler Corp., for example, has created a wellness program within its flexible benefits package that allows an "escape mechanism" in each wellness criteria for people with disabilities. "We do have an explanation section that says: if you have a health condition that would prevent you from meeting a criterion, get in touch with us," said Barbara Maddux, employee benefits staff specialist at Chrysler.

When filling out the criteria, Chrysler employees have the option of circling a response that says, for example, "My blood pressure is too high, but I am in a physician's care and working to meet the level acceptable for me." Circling such a response would not subject the employee to penalties in a benefits plan.

"We firmly believe in the wellness program efforts as a method of improving quality of life and reducing costs. We have active participation within the corporation, and we're really driving for educational components to show people the correlation between wellness and reduced claims," Maddux said.

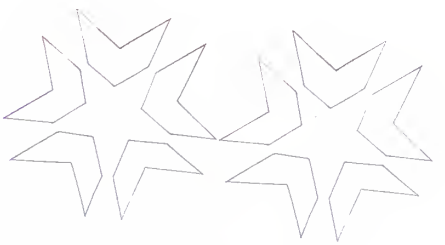
After passage of the ADA, another corporation, Ralston-Purina, designed and implemented a wellness program tied to its benefits package. "We were very careful to make sure that our pricings were risk-related and in accordance with the standard underwriting practices required by the ADA. We carefully considered the impact of the ADA as we built the program to be sure that we were making a good-faith effort to comply with the law and regulations," said Carl Londe, Ralston-Purina's manager of corporate compensation and benefit planning.

Making programs accessible

Another aspect of ADA compliance and wellness programs is physical access to the programs. Title I requires employers to include employees with disabilities in all non-work activities. It would be a serious mistake for an employer to assume that a wheelchair user would not want to participate in noontime fitness activities. Instead, the employer could locate a gym in an accessible site. "I would hope that employers are conscious at least of making facilities and programs available to people with disabilities. For example, when wellness programs cover nutrition, it's important for employers to consider the nutritional needs of people with disabilities and include that in the session. And then it's important for the employer to hold the program in a place that can be accessed by all employees," HIAA's Thomas said.

Title I requires employers to include employees with disabilities in all non-work activities.

From *ADA Compliance Guide* © 1993



Family & Medical Leave Act

FMLA and ADA address disability but differ in purpose, protection

The Family and Medical Leave Act (FMLA) of 1993 has provided American workers with new employment rights that overlap and sometimes seem to conflict with the ADA. Although both laws address illness and disability, they differ in purpose and provide significantly different protections.

This is an oversimplification, but it may help to think of the essential difference in this way: the ADA applies when an employee needs help to perform a job; the FMLA applies when an employee is not able to work.

The purpose of this article is to lay out the basic principles of both laws and show where their provisions coincide or conflict. To understand how these laws may apply to a particular situation, employers and employees should seek further information from their own human resources staff or the agencies listed in "Resources" following this article.

What are the purposes of these laws?

ADA: to provide equal opportunity in the workplace for people with disabilities

FMLA: to promote family stability and economic security by balancing the demands of the workplace with the needs of families

Which employers are covered?

ADA: private employers with 15 or more employees and all public employers regardless of size

FMLA: private employers with 50 or more employees and all public employers regardless of size

Which individuals are covered?

ADA: an applicant or employee who

- has a disability *and*
- is qualified to perform the job

FMLA: an employee who

- has been employed for at least one year *and*
- worked at least 1,250 hours during that year

What is the geographic requirement?

ADA: none

FMLA: For an employee to be eligible for leave, the employer's minimum of 50 employees must be employed within 75 miles of the requesting employee's work site.

When does protection apply?

ADA: when an applicant or employee has a disability, defined as

- having a physical or medical impairment that substantially limits a major life activity
- having a record of such an impairment *or*
- being regarded as having such an impairment

FMLA: when an employee gives birth or adopts a child or is unable to work because of his/her own or a family member's serious health condition. The term is defined as illness, injury, impairment, or physical or mental condition that requires

- inpatient care in a hospital, hospice, or residential care facility *or*
- continuing treatment by a health care provider

A condition may constitute a disability under the ADA or a serious health condition under the FMLA or both. The circumstances must be analyzed under each statute.

EXAMPLE: A person with a straightforward hernia may need surgery (and thus inpatient hospital care). He or she probably would be eligible for leave under the FMLA but would not be entitled to accommodation under the ADA because the condition is not substantially limiting.

EXAMPLE: An employer learns that an employee has a history of mental illness. If discriminated against, this employee is protected by the ADA for "having a record" of disability, but clearly would not be entitled under the FMLA because there currently is no serious health condition that makes the employee unable to work.

EXAMPLE: An employee with cancer may receive all 12 weeks of leave under the FMLA and still may ask for additional leave as an accommodation under the ADA. The employer would have to allow additional leave to the extent that it does not cause an undue hardship (see "What are the limits on employer obligations?").

What medical leave benefits are available?

ADA: Unpaid leave that does not cause undue hardship (see "What are the limits on employer obligations?") may be an appropriate reasonable accommodation. A maximum time period is not specified in law.

FMLA: maximum of 12 weeks leave for an employee with a serious health condition that makes the person unable to perform the job; an employee who qualifies for leave is entitled to it.

What family leave benefits are available?

ADA: none. The ADA prohibits discrimination against an employee who has a relationship with a person with a disability, but does not require an employer to provide accommodation (e.g., leave) for the employee simply because of that relationship.

FMLA: maximum of 12 weeks leave for an employee for the birth or adoption of a child or to care for a family member with a serious health condition; an employee who qualifies for leave is entitled to it.

What are the limits on employer obligations?

ADA: undue hardship, defined as a reasonable accommodation that would be too expensive or too disruptive to the organization's operation. An employer may take

into consideration any unpaid leave already taken under the FMLA in determining undue hardship under the ADA. A maximum time period is not specified in law.

FMLA: maximum of 12 weeks leave. There is no undue hardship limitation.

What are the reinstatement requirements?

ADA: entitled to position held before leave (assuming employee is still qualified). If the job is not vacant because holding it open would have been an undue hardship or if the person can no longer perform the job, the employer must consider reassignment to another position, including to a lower-level position.

FMLA: entitled to position held before leave OR to an equivalent or comparable position with equivalent benefits and pay. An employer does not have to show undue hardship in order to transfer an employee to an equivalent position.

What if the laws conflict?

The FMLA does not modify or affect any law prohibiting discrimination on the basis of disability, including the ADA. Thus a qualified person with a disability under the ADA may also be eligible for leave under the FMLA. When that is the case, the employer must analyze the situation under both statutes and follow the one that provides the greatest benefit to the employee.

Who is responsible for enforcement?

ADA: Equal Employment Opportunity Commission
FMLA: Department of Labor
– D.C.

resources

Help with ADA questions

U.S. Equal Employment Opportunity Commission, (800) 669-4000 voice, (800) 669-6820 TTY

Ohio Rehabilitation Services Commission, ADA Coordinator, (800) 282-4536 voice/TTY

ADA-OHIO information project, (800) ADA-OHIO voice, (800) ADA-ADA1 TTY

Great Lakes Disability and Business Technical Information Center, (800) 949-4ADA voice/TTY

Help with FMLA questions

U.S. Department of Labor's Wage and Hour Division offices in Ohio:

Cincinnati – (513) 684-2908
Cleveland – (216) 522-3892/3893
Columbus – (614) 469-5677

FMLA: Conflict or coordination?

By Peter A. Susser

Now that the Family and Medical Leave Act of 1993 (FMLA) has become law, employers must ensure that they are in compliance with both the FMLA and the ADA. Section 401 of the FMLA provides that: "Nothing in this act or any amendment made by this act shall be construed to modify or affect any federal or state law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability."

Seeking more information than necessary may violate the ADA.

Thus, employers providing federally-mandated family and medical leave must implement leave policies with an eye toward complying with the ADA. Temporary conditions, such as pregnancy, are not considered "disabilities" under the ADA. However, it is likely that a certain number of employees eligible for leave under the FMLA will qualify as disabled under the ADA. For example, employees with heart conditions requiring ongoing treatment, infection with the HIV virus, and most cancers will be entitled to the protections of both laws.

The FMLA and the ADA overlap in several circumstances, two of which are highlighted below.

Medical certification requirements

Under the ADA, an employer is prohibited from requiring a current employee to submit to a medical examination unless the examination is "job-related and consistent with business necessity." In addition, the ADA prohibits inquiries into whether an employee is an individual with a disability and the nature and severity of the disability.

The FMLA, however, allows employers to require employees to provide written certification from a health care provider to verify the need for family or medical leave. Under the FMLA, an employee may be required to provide information on the existence, nature and severity of a disability.

To avoid potential ADA violations, employers should follow certain procedures to ensure ADA compliance:

- Written certifications required by employers under the FMLA should be narrowly tailored to secure only the information necessary to verify leave requests. For example, an employer may ask that the physician verifying an employee leave request only certify that leave is necessary and not disclose detailed information regarding the medical condition that triggers the need for leave, or any long-term prognosis for the condition.
- If certification is required to support a request for family or medical leave, the information required should be job-related and consistent with business

necessity (e.g., need for, length of and timing of the leave). Seeking more information than necessary may violate the ADA.

- Employers should be careful not to inquire into possible future effects of an employee's serious health condition during the certification process. For example, if a written certification verifies that an employee has cancer, the employer may not inquire into whether the illness is terminal.
- Front-line supervisors should be instructed not to discuss leave requests or medical conditions with employees. Employers should designate a representative who is knowledgeable about leave policies and the ADA as the person responsible for processing leave requests.
- Employers should protect the confidentiality of any information obtained in a leave request. For example, only supervisors and managers should be informed that a leave has been granted, the length of the leave and the arrangements for work coverage during the leave.

Family leave/reasonable accommodation

The ADA prohibits discrimination against an individual, whether disabled or not, based on that individual's relationship to a person with a disability. Thus, an employee with a spouse, child or parent with a disability cannot be discriminated against with regard to employment benefits or privileges.

However, the EEOC's technical assistance manual states that an employer does not have to provide a reasonable accommodation to a non-disabled individual simply because he or she has a "relationship" with a disabled individual.

An employer who has allowed an employee to take 12 weeks of leave under FMLA may be required to extend that leave, as a reasonable accommodation, if the employee is considered "disabled" under ADA.

The FMLA provides protection (albeit limited) in this situation by requiring an employer to give an eligible employee up to 12 weeks of leave for a "serious health condition" of a child, spouse or parent. Therefore, while a nondisabled individual may not be able to take leave for a disabled family member under the ADA, that right would be extended under the FMLA.

The ADA's reasonable accommodation provisions may require an employer to provide extended leave for a disabling condition in certain situations. An employer who has allowed an employee to take 12 weeks of medical leave under the FMLA may be required to extend that leave, as a reasonable accommodation, if the employee is considered disabled under the ADA. The employer would not have to provide additional leave if it would impose an undue hardship on the employer's operations. However, an employer who already has provided a leave of absence to an employee may have a difficult time arguing that an extention would result in an undue hardship – particularly if the extension would be a brief one.

From *ADA Compliance Guide* © 1993

Retirement and disability plans need not be equal

Employers who offer a service retirement plan to their employees are not required to offer a disability retirement plan, too. And, even if both are offered, they need not offer the same benefits. That's the word from the EEOC, which addressed the issue in an addendum to its compliance manual on Title I.

Service retirement plans typically provide an income to employees who have reached a minimum age as stated in the plan and/or have completed a specific number of years of service with the employer. Disability retirement plans typically provide an income to an employee who is unable to work because of illness or injury, without regard to age.

"Nothing in the ADA requires an employer to provide a disability retirement plan, whether or not the employer offers a service retirement plan," the agency says. "Where an employer only offers a service retirement plan, there is no ADA violation as long as the service retirement plan treats persons who are covered by the ADA the same as other employees. The employer does not violate the ADA simply by providing different benefits under service and disability retirement plans."

From *Disability Compliance Bulletin* © 1995

Title II: Government Services

PUBLIC SERVICES *TITLE II* HIGHLIGHTS

Who is protected?

Any person who has an impairment that substantially limits a major life activity (or has a record of such an impairment, or is regarded as having such an impairment). In addition, the person must meet applicable eligibility requirements that are required by the service or activity in question.

Who must comply?

All state and local government entities; this means any organization funded by tax monies, including public schools.

What is required?

Governments must:

- not discriminate against a person in the participation of a service or program because the person has a disability.
- provide (to the extent possible) programs and services in an integrated setting.
- not impose eligibility requirements that deny people with disabilities an equal opportunity to participate in the program or service.
- make reasonable modifications (whenever possible) to any policies or practices that deny people with disabilities an equal opportunity to participate.
- provide auxiliary aids and services (such as a sign language interpreter) to ensure effective communication.
- provide telephone emergency services (including 911) that allow direct access for people with communications impairments.
- not charge an additional fee to a person with a disability to cover costs of accessibility.
- ensure "program access" for people with disabilities.

What is program access?

It means that government programs – when viewed in their entirety – must be readily accessible to and usable by people with disabilities. In other words, all public services must be available in locations that are accessible even if not all public buildings are accessible.

What is not required?

Government is not required to:

- remove all physical barriers in all existing buildings as long as all programs are available in locations that are accessible (see "What is program access?" above).
- take any action that would result in a fundamental alteration of a program or an undue burden.

* *NOTE:* This publication does not include information on Title II's extensive requirements for public transportation services operated by state and local governments. The U.S. Department of Transportation has written regulations covering these services.

Title II unfunded?... not!

Federal funds can be found

By Geoff Nishi, architect, MGB, Inc. Architecture and Engineering, Lancaster

Good news for all units of local government: There is money available to build your way into compliance with Title II of the Americans with Disabilities Act.

Title II of the ADA is federal law that mandates equal opportunities for people with disabilities to participate in and benefit from the services, programs and activities of all units of state and local government and their departments, agencies, special purpose districts and other instrumentalities. The ADA was signed into law on July 26, 1990, and Title II went into effect on Jan. 26, 1992. All public entities were required to perform a self-evaluation and develop a transition plan by July 22, 1992. Structural changes in facilities identified in the transition plan were to have been completed by Jan. 22, 1995. In other words, governments were given two-and-a-half years to get the job done.

As I write this in 1996, no one knows what the level of compliance was then or what it is now. Federal, regional and state authorities have not been keeping score. Furthermore, none are willing to venture even a ballpark guesstimate. If the experience and limited data of the architecture and engineering firm of which I am a part is representative of Ohio as a whole, the compliance level is bad – very bad.

Of 32 county, city, village and township governments whose programs and facilities that we have surveyed, none – zero percent – had completed compliance or had previously developed a transition plan.

Our building inspections included 90 facilities required to be accessible under Title II. Only four percent were in compliance, all having been newly constructed according to enforced accessibility guidelines. Thirteen percent had undergone some modifications in an attempt to achieve compliance, and these efforts were inappropriate more often than not. In several cases, the modifications created extreme hazards and major legal liabilities; for example, the use of towel bars for grab bars.

To date, I have queried 21 counties located in central and southeastern Ohio. Only two are addressing the Title II needs of local governments in a comprehensive and concerted fashion.

Why such a low level of performance years down the road? The standard response offered by local officials is, "Unfunded mandate ... I know we are supposed to do something, but we don't have the money. Besides, nobody's telling us what to do."

The lack of money to effect immediate change has caused usually responsible officials to summarily dismiss the issue and remain uninformed. Certainly, given the budgetary crises of today, it is impossible to achieve compliance overnight. That was never an intention of the mandate. No arm twisting here, there aren't even authorities to keep score. Governments were gently asked in a spirit of goodwill and fairness to voluntarily comply and make do with a small but steady stream of money. This flow of money seems to have been overlooked – so much so that nine of every 10 officials I have spoken with did not know of its existence.

As for the complaint that there isn't anyone out there to tell you what to do, there isn't. However, there are lots of people who are expert and willing to assist you in handling the issue. What has been missing until now is an "easy if done this way" approach.

Take heart and remember, Title II compliance is a *funded* mandate, there is a model plan and there are people available to help you get the job done. All it takes is your involvement and a little attention.

Washington is sending tax dollars back to your community so that you may locally address specific issues of national concern. ADA Title II is one of those issues.

The money to build your way into compliance comes from the U.S. Department of Housing and Urban Development in the form of Community Development Block Grants (CDBG). These CDBG dollars are available to every unit of local government within the state. Seven urban counties and 32 cities receive their funds directly from HUD. The remaining 81 counties and 116 small cities receive their funds through the Ohio Department of Development, Office of Housing and Community Partnerships. Washington is sending tax dollars back to your community so that you may locally address specific issues of national concern. ADA Title II is one of those issues.

As was mentioned previously, only two of 21 counties queried are dealing with Title II compliance issues on an areawide and comprehensive basis. Although they are only at the beginning, they are nonetheless on a sure and scheduled track to realizing their goal. How they are doing it is a worthy model for all to emulate.

The Fairfield County commissioners and Priscilla Steele of the Fairfield County Regional Planning Office are the insightful pioneers who created a very real and easy-to-

execute plan that would work for all. It has four parts.

Step One: Contact all constituent governments within the CDBG recipient area, inform them of the free (no cost to local government) compliance plan and confirm their desire and support.

Step Two: Utilize CDBG funds to execute an areawide survey that clearly and comprehensively identifies what needs to be done.

Step Three: Analyze the data and establish a step-by-step redemption plan that is tied to yearly CDBG funding. You may be as surprised as I was to discover that 90 percent of the things that need to be done can be accomplished by the maintenance staffs using small amounts of materials.

Step Four: Follow through year by year and be proud of your progress toward a certain and happy conclusion.

The most difficult part about all of the above is just getting the message across. There is money, there is a plan and there are people - all at the ready to work with you.

resources

Block grants for governments

Funding available through the Community Development Block Grant program at the U.S. Department of Housing and Urban Development may be used for accessibility purposes such as installation of ramps, curb cuts, wider doorways, wider parking spaces and elevators.

Units of local government that have specific questions concerning the use of CDBG funds for the removal of barriers should contact their local HUD Office of Community Planning and Development, or call the Entitlement Communities Division at HUD, (202) 708-1577, for additional information.

Help for towns, townships

Small communities have the same obligations as large cities to make themselves and their services accessible to citizens with disabilities. Likewise they are obliged to perform a self-evaluation and write a transition plan, and both of these should have been accomplished some time ago. For those who still don't know how to start, *The Americans with Disabilities Act: A Compliance Workbook for Small Communities* is an excellent resource published by the National Association of Towns and Townships. At just under 70 pages, it is large enough to be complete, but small enough to be usable. Copies are available for $5 from the Ohio Township Association at (614) 863-0045.

Get started today by contacting ADA-OHIO, 4550 Indianola Ave., Columbus, OH 43214-2246; (800) ADA-OHIO (voice), (800) ADA-ADA1 (TTY), or (614) 784-0029 (fax).

Financing curb ramps

A letter to the Department of Justice (DOJ) asked who was responsible for paying the installation cost for a curb ramp. A town had billed someone who lived in a house located where the curb ramp was installed.

Title II required each public entity to provide a schedule for installing curb ramps in its transition plan, with priority given to sidewalks that serve entities covered by the ADA.

DOJ emphasized in a policy letter that the ADA does not mandate any particular method of financing required changes. However, DOJ said, "it has generally been assumed that such changes would be financed through the covered entity's general revenues, not by imposing special costs on any individual resident of a town or city."

Although municipalities commonly bill abutting property owners for the cost of sidewalk improvements, these charges are usually based on the theory that the abutting property is enhanced by the improvements. DOJ observed, "Curb ramps that are installed to meet the town's overall obligations under the ADA do not provide a particular benefit to the adjacent property owner and are more properly paid for through general revenues or other funds available for street and sidewalk improvements."

However, because the ADA and implementing regulations did not address this issue, the final determination with respect to payment for improvements undertaken to comply with the ADA is to be made by the taxing entity, DOJ concluded.

From *ADA Compliance Guide* © 1995

Fire stations required to make programs accessible

An inquirer wrote to the DOJ asking to what extent fire stations are required to be made accessible under the ADA. The fire station was used primarily to house firefighters, trucks and equipment, but did occasionally offer tours of the station and equipment to interested groups. In response, the DOJ wrote that Title II of the ADA does require state or local government fire stations to make their programs accessible. The response pointed out that accessibility may be achieved by making physical changes to existing buildings, acquiring or redesigning equipment, reassigning services to accessible buildings and delivering services at alternate accessible sites. The DOJ also noted that tours may be provided of accessible existing facilities, and audio-visual displays may be provided of inaccessible areas.

From *Disability Compliance Bulletin* © 1994

Dignity and the ADA

The hand that opens the window

By Jonathan G. Martinis, an attorney engaged in private practice

My Uncle Robert always opens windows by himself because my grandfather insisted on it.

I remember asking my grandfather why Uncle Bob, with his cerebral palsy, who needs assistance to get up in the morning and go to bed at night, who can neither feed nor clean himself, should have to open windows by himself. He told me that if Uncle Robert didn't do it by himself, no one would ever know that he could – and that would be undignified. All people, he said, are born with dignity – a power of self-determination that can only be taken away by another person who refuses to respect it.

He explained that when people do for you what they assume you cannot do for yourself – without any actual concern for you but to put you and your perceived troubles behind them – they *deny you the opportunity and the right to do something you are perfectly capable of doing*. They steal away your dignity. If people deny your dignity, you must force them to respect it. Therefore, Uncle Robert must always open windows by himself. Otherwise, people would open windows for him – and never actually look at him. They would be able to avoid looking in his eyes and deny his dignity for another five seconds while they worked the crank.

My grandfather sought for years to ensure that Uncle Robert, who, it was decided before birth, would never walk or speak, would be treated with dignity. He pushed and cajoled, called in political connections and jawboned everyone he knew so his son could go to school to learn to create and communicate and open windows. My uncle still goes to school. And if you refuse to recognize his dignity, he'll force it on you by spelling it out on the letterboard he wears on his lap.

I did not actually hear the word "Paternalism" until a few years ago. When used in regard to people with disabilities, Paternalism is an attitude so long espoused by society that it has become the norm. Paternalism treats people with disabilities like pets. When they attempt to escape boundaries set for them, Paternalism scoops them up and puts them wherever it wants, out of its way, and expects them to be happy because they received its attention. Through the ADA, victims of disability discrimination can force Paternalism to respect their dignity – to open its eyes and let them open their own windows.

The ADA has come under attack. *The Wall Street Journal*, in a widely cited article, inferred that the act is a kind of refuge for people with bad backs and workplace whiners who want jobs and benefits handed to them. I spent a year working in a free legal clinic for people with disabilities and came in contact with typical casualties of Paternalism:

- A music teacher with severe rheumatoid arthritis asked her school for a key to its elevator. Until that point, she had been forced to carry musical instruments up three flights of stairs each day to reach her classroom. The principal derided her for wanting to be employed "like everyone else" but still demanding special privileges.
- A computer programmer who contracted multiple sclerosis was laid off in a "reduction in work force" that consisted of himself and eight other workers – all of whom had physical disabilities. He was forced to sign a form waiving his right to sue the company in return for his severance pay "like everyone else" did.
- A government employee with 20/200 vision who worked all day at a computer terminal requested five-minute breaks every few hours. When her request was denied, she lodged a complaint with her union. Several "counseling memoranda" criticizing her work were then placed in her personnel file. When she complained again to the union, she was told she should expect to be treated "like everyone else."
- A woman suffered a stroke and was left with severe cognitive impairments. Upon her recovery, she began to take courses at a community college, in her words, to get back into society and attempt to make something out of her new life. The stroke had left her with difficulty retaining information, necessitating that she tape her classes. When she asked a question in class, her teacher announced to the class that this type of "stuff" was holding everyone back. When she approached the teacher after class to explain why she had the gall to ask a question, he said he didn't want to hear any of her "disabled crap" and that if she didn't like it and didn't want to be treated "like everyone else" she should drop the class. When she lodged a complaint with the school, she was told that maybe she should cease taking classes there.

Paternalism is an attitude so long espoused by society that it has become the norm. Paternalism treats people with disabilities like pets. When they attempt to escape boundaries set for them, Paternalism scoops them up and puts them wherever it wants...

In all these cases, people with disabilities were told they were being treated "like everyone else" when, in

fact, someone was actively discriminating against them. This Paternalistic attitude sees that people with disabilities are "like everyone else" when they are out of the way – when their disability and their dignity need not be recognized.

The statistics regarding the underemployment of people with disabilities are staggering, begging the question: Why is it that society does not deride people with disabilities for not working the way it derides the "lazy" homeless or the "shiftless" underclasses whom society says are unemployed not for lack of training or jobs but for lack of the desire to work? The answer lies in Paternalism. Paternalism is only too happy to keep people with disabilities on welfare and out of the way ... to protect its sensibilities and deny people's dignity.

A person's dignity, my grandfather said, must be protected. If you will not respect it, be prepared to have it forced upon you. Unless employers take steps to recognize and respect the dignity of their employees and job applicants, they will face a dramatic increase in lawsuits. Under the ADA, before a victim of disability discrimination may sue, that person must first file a complaint with the Equal Employment Opportunity Commission (EEOC). If the EEOC does not take action on the complainant's behalf before 180 days pass, the complainant may demand a "right-to-sue" letter. Upon receipt of the right-to-sue letter, the complainant may then launch a lawsuit against the employer.

Each year, the number of complaints to the EEOC will grow. The EEOC will issue more right-to-sue letters and employers will be forced to defend an ever-increasing number of private lawsuits seeking millions of dollars in damages. The damage awards to victorious plaintiffs under the ADA are a potential nightmare for employers. A victorious plaintiff under the ADA is entitled to back pay (and, possibly, front pay) with interest accumulated from the date of the discrimination. The plaintiff may also recover punitive damages based on the size of the employing company up to a maximum of $300,000.

Most frightening for employers is the potential for tacking other private claims onto the discrimination claim to create a much larger award. Employees who are discriminated against because of their disabilities may also sue the employer for intentional infliction of emotional distress – a true tort cause of action that can result in million-dollar awards. (Case law suggests that intentional infliction of emotional distress is "outside" of workers' compensation and thus actionable.)

Moreover, as any employer knows, the costs of defending a lawsuit approach, if not exceed, the cost of losing one. Thus, employers can add to the "ledger" of an ADA or other disability discrimination suit the billable hours charged by their legal departments or corporate counsel. The implications of the ADA are clear: Respect the dignity of people with disabilities or pay the damages.

It now remains for people with disabilities to force those who will not recognize and respect their dignity to do so. The ADA provides people with disabilities the legal tools necessary to defeat Paternalism. Employers must prepare themselves for a spate of lawsuits if they are unwilling to respect the dignity of their employees and job applicants.

It may well be that employers will not "wake up" until the first large award. At that time the legal adage will prove true: People need a kick in the behind to get their attention, for the behind is where people keep their wallets.

From *In The Mainstream*, Jan/Feb 1995

In the courts

City's plan to end programs for citizens could violate Title II

West Palm Beach's plan to terminate funding for programs catering to individuals with disabilities and their families may violate Title II, the U.S. District Court for the Southern District of Florida has ruled by granting a pre-liminary injunction to prevent the termination.

In *Concerned Parents to Save Dreher Park Center v. City of West Palm Beach,* the court ruled that Title II's regulations clearly prohibit excluding qualified persons with disabilities from participating in or enjoying the benefit of public services, programs or activities. As such, the court ruled, "if the city's recreational program is not merely one athletic or other activity but rather an entire network of individual activities and services," cancelling the programs geared to people with disabilities would discriminate against them.

The court noted that even if the discriminatory action is not intentional, it can still violate the ADA. Thus, cancelling programs for people with disabilities but maintaining that they are free to join other programs in which they cannot participate due to their disabilities could still violate the law. "If the city chooses to provide leisure services to non-disabled persons, the ADA requires that the city provide equal opportunity for persons with disabilities to receive comparable benefits."

From *ADA Compliance Guide* © 1994

How to get professors to provide academic accommodations

Professors must be instructed about their responsibilities under the ADA and Section 504 of the Rehabilitation Act (prohibiting federal fund recipients from discriminating based on disability). But tread lightly, advises Sue Williams, ADA/Section 504 compliance officer at Georgia Southern University in Statesboro, Ga. She emphasizes the importance of respecting professors' concerns about maintaining their academic freedom.

Academic accommodations workshops

"Tact" is the key word when trying to convince professors reluctant to provide accommodations requested by the university's office of disability services. "I learned real quickly – one thing you don't do is sit them down and tell them that's the law and they have to follow it," Williams said.

Instead of dealing with professors individually, Williams has found more success in educating professors about their ADA/Section 504 accommodation obligations at a departmental level. Each year, she and the coordinator of disabled student services conduct a one-hour presentation at the faculty meetings of each of the college's departments, preferably at the beginning of the academic year. The presentation includes showing a short video that describes the ADA and Section 504 and their requirements to accommodate otherwise qualified students with disabilities. Williams reminds the faculty that accommodations suggested by disabled student services are tailored for each student's individual needs. She also distributes a 35-page guide on providing reasonable accommodations.

Students with learning disabilities

Some professors are reluctant to accommodate students with such "hidden" impairments as learning disabilities. Concerned with maintaining their academic freedom, high standards and fair testing methods, these professors initially balk at providing such accommodations as extra time for tests.

Refusal to assign roommate is discrimination against student

A university's refusal to assign a dormitory housing roommate to a student with cerebral palsy violated the ADA and Section 504 of the Rehabilitation Act, a federal district court in Nebraska decided. After a trial, the court decided that the student, who used a wheelchair and required minimal attendant care, was qualified to participate in the roommate assignment program, and that the university's blanket policy of excluding students with disabilities who require personal attendant care violated the ADA and Section 504. As implemented, the policy unnecessarily separated students with disabilities from those without disabilities. The court awarded injunctive relief, compensatory damages and attorneys' fees and costs.

From *ADA Compliance Guide* © 1993

Wrongful arrests covered

Arrests of people with disabilities who are wrongly suspected of being under the influence of drugs or alcohol are covered by Title II of the ADA, the U.S. District Court for the District of Maine has held. In *Jackson v. Inhabitants of Sanford*, the court ruled that a man with disabilities caused by a stroke was entitled to a trial on his ADA claim against the town of Sanford, Me., and the police officer who arrested him for drunk driving.

The officer asked the driver to perform field sobriety tests, which he performed poorly because of his disabilities. The officer then handcuffed the driver and placed him in the back seat of a police cruiser, where he slipped face down on the seat and was unable to sit up while being transported to the police station. He was allowed to go home only after it took officers nearly two hours to determine he wasn't under the influence.

The driver sued, contending that the town failed to train its police officers appropriately. The court declared that Title II "clearly applied to acts of discrimination by a public entity against a disabled individual."

From *BNA's ADA Manual* © 1994

DOJ settlement reinstates volunteer firefighters with HIV

The Department of Justice (DOJ) sometimes resolves cases without filing a lawsuit by means of formal written settlement agreements.

In Marshall County, Miss., a settlement agreement resolved two complaints involving the discharge of volunteer firefighters for HIV-related reasons. The first complainant alleged that he had been removed from membership in a county-funded volunteer fire department after that department learned he was HIV-positive. The second complainant alleged that he had been removed from membership with county-funded fire departments as a result of his known association with the first. The county agreed to reinstate both men, pay each $1,000 in damages, and conduct training for all volunteer firefighters on universal precautions to prevent the transmission of HIV during firefighting activities.

From *Enforcing the ADA, Update*, Jan.-Mar. 1995

"Professors who have been here 20 to 25 years don't believe in learning disabilities to begin with." However, this disbelief often diminishes once Williams informs them about the Georgia public university system's uniform criteria for identifying students with learning disabilities. "Once they know there are criteria, that helps," Williams said.

Other things that help include Williams making a presentation to new professors during orientation and an annual disability awareness day (held in a part of the student union that professors frequently traverse). Students who have identified themselves as having a disability with Williams' office are given a letter outlining their accommodation needs, which they must give to each professor at the beginning of every term.

For students who require testing accommodations, an exam proctoring form is attached to the letter. Professors twho cannot proctor a student during additional time for an exam, can fill out the form. Williams will set up a room for the student, pick up the exam, arrange for monitoring while the student takes the test and have someone return the exam to the professor.

But some professors still refuse to accommodate otherwise qualified students with disabilities. Why?

Not asking for something extra

"When students ask for accommodation, professors initially respond with 'you're asking for something extra,' or 'so, you want an easy ride.' We have to show them that's not the case – that we're trying to give equal opportunity," Williams says.

If a professor has refused to provide an accommodation, Williams and the coordinator of disabled student services meet with the professor and student to discuss the reasons for the refusal and encourage the professor to provide requested accommodations.

Sometimes, Williams discovers that a student asked for an accommodation that was not approved by disabled student services. In such cases, the student needs to understand the inappropriateness of such requests.

Other times, professors think of accommodations that were not requested, which they would prefer and think would work better than requested accommodations.

"It's amazing how professors sometimes come up with accommodations we hadn't thought of," Williams notes.

Williams advises a little bit of role reversal to make the whole process work. "I put myself in the professor's place and think, 'How would I like to be approached?'"

But what if a professor leaves the meeting still refusing to provide an accommodation Williams has requested? Professional behavior becomes especially important if all else has failed, she notes. If professors remain intransigent, Williams tells students they have the right to appeal noting, "I have to be frank with the professors. We're professionals in the field. I tell them the accommodation is our determination and the student now has the right to appeal to the vice president of academic affairs."

resources

Info for libraries, colleges

"The Americans with Disabilities Act: Its Impact on Libraries" is a compilation of a preconference session held prior to the 1992 American Library Association annual conference. It is available for $28 by contacting the American Library Association Order Department, 50 E. Huron St., Chicago, IL 60611; (312) 280-5108.

Title by Title: The ADA and Its Impact on Postsecondary Education provides a review of disability legislation and a practical explanation of the ADA as it affects postsecondary educational institutions. The monograph is available for $35. Contact: S. Evans, Association on Higher Education and Disability, P.O. Box 21192, Columbus, OH 43221.

Should a professor still resist, appeals go to the university president and then the U.S. Department of Education's Office for Civil Rights. However, Williams noted "we haven't gotten that far."

From *ADA Compliance Guide* © 1995

NOTE: Although this article originated in Georgia, many Ohio colleges and universities also offer excellent services through offices that support students with disabilities.

Use of fragrances not barred

Responding to an inquiry about the duty of public entities to make reasonable modifications for the benefit of individuals with multiple chemical sensitivities, the Department of Justice (DOJ) offered guidance as to how far that duty extends under Title II of the ADA.

The department advised that a public entity is not required to prohibit the use of perfume or other scented products by employees who come into contact with the public. The DOJ reasoned that such a requirement would not be a reasonable modification of a public entity's personnel policies. Further, the department offered, the regulation implementing Title II does not require public entities to adopt public access policies with respect to individuals with disabilities or any particular class of individuals with disabilities.

From *Disability Compliance Bulletin* © 1995

Title III: Public Accommodations

PUBLIC ACCOMMODATIONS HIGHLIGHTS

TITLE III

What is a public accommodation?

It is a privately-owned business that is open to the public – restaurants, retail stores, doctor offices, day care centers. Also included are businesses offering exams or courses for the purpose of licensing, certifications, or credentialing.

What is not a public accommodation?

The following are not covered by this part of ADA:

- commercial facilities (examples: office buildings, factories, warehouses) that may have employees but are not generally open to the public for sales or service.
- religious organizations and entities controlled by such organizations.
- private clubs.
- state and local governments (subject to Title III regulations).

Businesses are required to:

- provide (to the extent possible) goods and services in an integrated setting.
- make reasonable modifications (whenever possible) to policies or practices that deny equal access to people with disabilities.
- provide auxiliary aids to ensure effective communication.
- remove barriers from existing buildings when "readily achievable."
- provide alternative measures when barrier removal is not readily achievable.
- alter existing facilities and build new ones in accordance with the ADA Accessibility Guidelines.
- not charge an additional fee to a person with a disability to cover any costs of accessibility.
- permit the use of guide dogs and other service animals.

When is removal of a barrier "readily achievable?"

The term applies when removing a physical or communication barrier can be done easily and without much expense.

Businesses are not required to:

- make a modification that would fundamentally alter their operation, goods or services.
- disregard legitimate safety requirements that apply to operating a business or to determining what barrier removal is readily achievable.
- provide auxiliary aids that would cause an undue burden (in other words, would be too expensive or would result in a fundamental alteration of the business' services).
- provide services outside their legitimate areas of specialization (e.g., a physician can refer a person who is deaf to a cancer specialist because the individual needs specialist care, but not because the other doctor has experience communicating with people who are deaf).

Auxiliary aids and services

Retailers must do more than just offer assistance

QUESTION: I notice that many of the stores in my area now include decals on their entrance doors indicating that persons with disabilities should ask for assistance if it is needed. Is this all that stores need to do in order to comply with the ADA's accessibility requirements?

ANSWER: No. For some individuals with disabilities, an offer of assistance may be enough to satisfy the act. However, the requirements are flexible and depend on the nature of the disability involved and the unique facts and circumstances of the retail establishment. For example, in a May 1993 opinion letter, the Department of Justice said that a retail establishment may not offer assistance in retrieving inaccessible items if an accessible arrangement of merchandise is readily achievable. Therefore, a retailer should not assume that a willingness to provide assistance will bring the store into compliance with the act.

For people with communication difficulties, a retailer is obligated to provide "auxiliary aids or services" unless an undue burden or a fundamental alteration in the nature of goods and services would result. For example, a store clerk might provide information to an individual with a hearing impairment by writing on a pad or a computer. However, an expensive, complicated purchase – like a new car – might require the services of a qualified sign language interpreter.

The test is whether the auxiliary aid or service would result in a fundamental alteration of the nature of the goods or services involved or an undue burden on the retail establishment. An undue burden means "significant difficulty or expense." A qualified interpreter is probably not an undue burden for a car dealership, given the size of such a business and the price of the goods sold there. This does not mean that a car dealership must have a qualified interpreter on staff, only that arrangements for an interpreter should probably be made when entering serious negotiations with a person with a hearing impairment.

Retailers also are required to remove architectural barriers when it is readly achievable to do so. "Readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. The regulations list 21 examples of modifications that may be readily achievable, including ramps, curb cuts and repositioning shelves. Thus, a retailer is required to rearrange the layout of merchandise to allow wheelchair access, unless it would result in a loss of selling or serving space.

In removing barriers, the retailer should comply with the ADA Accessibility Guidelines. If compliance is not readily achievable, the retailer must try to remove barriers in another way. For example, if a store cannot be made more accessible, a retailer may offer home delivery as an alternative to removing barriers.

A company cannot make a one-time determination of what barriers will be removed and rely on that to establish compliance with the law, as what is readily achievable may change over time. The regulations recommend that companies develop a self-evaluation process and a long-term compliance plan, and seek advice from disability groups. The regulations also recommend the following order of priorities for barrier removal: 1) access to the facility itself; 2) access to goods and services sold there; and 3) access to public restrooms.

From a response by Gary Buchanan, Esq. to a question submitted to *Disability Compliance Bulletin* © 1994.

Health care provider obligated to patron with deafness

It's fairly well understood that the ADA forbids discrimination against people with disabilities in places of public accommodation. That's the easy part. The hard part is knowing how to apply this principle in real situations, and no situation has generated more questions than that of a person who is deaf or hard of hearing seeking the services of a health care provider.

Places of public accommodation must be accessible to people who are deaf or hard of hearing through provision of auxiliary aids and services to remove barriers to communication. The federal regulations offer these examples of auxiliary aids and services: qualified interpreters, transcription services and written materials, as well as the provision of telecommunication devices for the deaf (known as TDDs, TTYs or text telephones), telephone handset amplifiers, television decoders and telephones compatible with hearing aids.

People who use sign language often need an interpreter to receive safe and effective medical treatment. ... Doctors need to incorporate these types of expenses into overhead costs such as staff, equipment, rent and utilities.

People who use sign language often need an interpreter to receive safe and effective medical treatment. A doctor must be able to communicate effectively and accurately with a patient who uses sign language to avoid the grave risk of misunderstanding the symptoms, misdiagnosing the problem, and prescribing inadequate or even harmful treatment. Further, without an interpreter a patient may

not understand medical instructions and warnings or prescription guidelines.

Who pays for this? This is one area in which the ADA regulations, known for their ambiguities, are quite clear:

> *A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal... and reasonable modifications... that are required to provide that individual or group with the nondiscriminatory treatment required by the Act. [28 C.F.R. 36.301(c)]*

Two caveats are appropriate here. First, sign language is regarded as a distinct language, independent of English, and as such requires interpretation by trained, experienced people, just as any spoken language. Particularly in a medical setting, it could be dangerous to use someone on staff who "knows a little sign." Second, it may be unwise to let a patient's relative or friend interpret, even someone proficient in sign language, because of confidentiality concerns; in sensitive matters, a family member may not always be an objective interpreter.

When the doctor and patient cannot agree on the appropriate auxiliary aid, the Justice Department strongly urges the doctor to consult with the patient about the effectiveness of a proposed auxiliary aid and cautions that interpreter service may for some people be the only satisfactory aid for complex or lengthy discussions.

Health care practitioners should be aware that an interpreter might need to be present in any of the following situations: obtaining a medical history; obtaining informed consent and permission for treatment; explaining diagnoses, treatment, and prognosis of an illness; conducting psychotherapy; communicating before and after major medical procedures; explaining medication; explaining medical costs and insurance issues; and explaining patient care on discharge from a medical facility.

So who pays?

The doctor pays.* It's the law, and it's about equal access to services. But unlike other civil rights laws that entitle everyone to equal treatment, the ADA requires treating people with disabilities according to their needs. That is their guarantee of equal access. Doctors need to incorporate these types of expenses into overhead costs such as staff, equipment, rent and utilities.

– D.C.

Based on "Memorandum on the Obligation of Health Care Providers Under the Americans with Disabilities Act," published jointly by the National Center for Law and the Deaf and the American Foundation for the Blind.

* Small businesses (earnings less than $1 million per year, 30 or fewer full-time employees) may qualify for an annual tax credit equal to 50 percent of "access expenditures" incurred to comply with the ADA. The first $250 does not earn any tax credit, nor do expenses in excess of $10,250. See "Tax Incentives" on page 19.

Who's responsible for accessibility – landlord or tenant?

The ADA generally requires places of public accommodation to remove barriers to access when such removal is "readily achievable." More specific to the landlord/tenant relationship, ADA regulations state:

> *Both the landlord who owns the building that houses a place of public accommodation and tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract." (28 C.F.R. 36.201 (b)).*

Initial efforts at drawing up the regulations attempted to allocate specific responsibilities to landlords and tenants. After numerous commenters pointed out that the allocations would not apply in all situations, proposed specifics were removed from the final regulations. Some leases give the tenant permission to make alterations and others forbid it; some permit the landlord to enter a tenant's premises to make alterations and others don't; and some leases contain a "compliance clause" in which one of the parties accepts responsibility to comply with all federal, state and local laws.

Another question arose as to whether the responsibility would shift to the landlord if a modification was not readily achievable by the tenant. Would a landlord be required to accept a tenant's word that the removal of a barrier was not readily achievable?

More insight on the issues involving tenants and landlords is provided in the appendix to the final regulations:

> *The ADA was not intended to change existing landlord/tenant responsibilities as set forth in the lease. By deleting specific provisions from the rule, the [Justice] Department gives full recognition to this principle. The suggested allocation of responsibilities contained in the proposed rule may be used if appropriate in a particular situation. Thus the landlord would generally be held responsible for making readily achievable changes and providing auxiliary aids and services in common areas and for modifying policies, practices and procedures applicable to all tenants, and the tenant would generally be responsible for readily achievable changes, provision of auxiliary aids and modification of policies within its own place of public accommodation.*

Condos generally not covered

The Department of Justice states that Title III of the ADA does not cover residential areas of condominiums that are strictly for the use of tenants and their guests. However, areas within condominiums that are places of public accommodation within the meaning of Title III must

resources

AFB consultants focus on needs of visually impaired

The American Foundation for the Blind (AFB) has established a consulting group to help businesses, government agencies and industry comply with the ADA. The consulting group will provide services on all aspects of ADA compliance, with a special emphasis on the needs of individuals with visual impairments. Contact Elga Joffee, ADA Consulting Group, AFB, 15 W. 16th St., New York, NY 10011; (212) 620-2047.

AFB also publishes two self-evaluation checklists – one for hotels/motels and the other for health care facilities – to help those entities ensure access to customers and patients who are blind, deaf/blind or visually impaired. Another publication, "Of Consuming Interest: A Guide to Titles II and III of the ADA for People with Vision Loss," may also be obtained. For copies (including alternate formats) contact: Government Relations Department, AFB, 1615 M St. N.W., Suite 250, Washington, DC 20036.

Book answers 146 questions

The ADA Answer Book is a publication of BOMA (Building Owners and Managers Association) International that addresses "the 146 most critical questions about the Americans with Disabilities Act, Title III." BOMA has produced numerous ADA resources, including "The ADA Video" on public accommodations, which was done under a contract with the Department of Justice. BOMA members can purchase the book for $35 or the video for $38; list prices are $60 and $52, respectively. Quantity discounts are available. Call (800) 426-6292.

Industry-specific guidance

The Council of Better Business Bureaus' Foundation answers ADA questions through "Access Equals Opportunity" guides for nine different service industries: retail stores, grocery stores, restaurants/bars, car sales/service, fun/fitness centers, medical offices, travel/tour agencies, small shops and services, and professional offices. Cost is $2.50 each or $12 a set. Bulk discounts available. Contact: CBBBF, Dept. 024, Washington, DC 20042-0024; (703) 247-3656.

The American Hotel & Motel Association provides the publication *Accommodating All Guests* which discusses the ADA as it pertains to the lodging industry. Contact the group at 1201 New York Ave., NW, Washington, DC 20005; (202) 289-3100.

comply with the requirements of the title. In addition, parking areas, entrances, access routes and restrooms serving places of public accommodation must comply with Title III's requirements.

From *Disability Compliance Bulletin* © 1993, 1994

Film captioning not required

In January 1992, the DOJ responded to a question about whether theaters are obligated to have some showings of films with captions. Here is the department's response: "Movie theaters are places of public accommodation and, therefore, subject to the requirements of the ADA. However, the act does not require movie theaters to offer film showings with open captioning. This issue was specifically addressed by Congress during the legislative process, and Congress indicated that open captioning would not be required. Closed captioning cannot be used because it is not a technology that is currently compatible with film projection."

Ohio requires access to church

While churches are exempt from ADA Title III accessibility requirements, they are not exempt from other federal or state provisions related to architectural and programmatic accessibility. Churches receiving federal financial assistance to provide nutrition sites/programs, Head Start programs, etc., are subject to the provisions in Section 504 of the Rehabilitation Act of 1973. Also, non-religious entities (whether receiving federal assistance or not) may be subject to Title III if they conduct activities in church facilities.

Churches have been considered places of public accommodation under Ohio's Civil Rights Statute since 1976 and are subject to the accessibility provisions in the Ohio Basic Building Code. In February 1993, Ohio adopted the ADA accessibility guidelines (ADAAG) as its standard for new construction and renovation. As a result, Ohio churches are required to follow those guides.

No need to alter inventories

The DOJ responded to an inquiry from a Pennsylvania senator who wrote on behalf of a constituent with a hearing impairment. The constitutent was dismayed by his inability to locate for purchase a cellular phone that was compatible with hearing aids like the one that he used. In response, the DOJ indicated that the ADA does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities. However, if cellular phones that are compatible with hearing aids do become available, a store that sells cellular phones would be required to special-order such a phone if the store usually made special orders for un-stocked goods in the normal course of its operation.

From the *ADA Compliance Guide* © 1993

Weight Watchers International agrees to provide meeting aids

Weight Watchers International will take additional steps to accommodate persons with disabilities – including the use of video closed captioning – as part of the settlement of a lawsuit. The weight loss company was sued last year by Bryen Yunashko, a user of American Sign Language, whose request for an interpreter at weekly support group meetings was allegedly denied.

In *Yunashko v. Weight Watchers Southern California, Inc.*, the plaintiff's attorney said that Weight Watchers, as a public accommodation, is required to provide an interpreter – unless it can prove that to do so would be an undue burden. According to the suit, Yunashko attended a Weight Watchers meeting and was given a copy of notes that the group leader uses to facilitate discussion. Yunashko, however, stated he was unable to understand the conversations between staff and other members.

According to plaintiff's attorneys, Weight Watchers "already has a policy in place to ensure that individuals with disabilities are fully accommodated." In response to the complaint, attorneys say the company will take additional steps, including implementing a TTY line, eliciting requests for auxiliary aids at registration and ensuring that all persons who require a sign language interpreter will be provided one.

From *Disability Compliance Bulletin* © 1995

Brewery must allow guide dogs

A brewery's tour policy requiring visually impaired guests to use a human guide instead of a guide dog violated the ADA, a federal district court has ruled in *Johnson v. Gambrinus Co./Spoetzl Brewery*. The Texas brewery offers a guided public tour of its manufacturing facilities. According to the court, Franklin Johnson, who is blind, appeared at the brewery to take the tour accompanied by his trained guide dog, Romney. Brewery employees told Johnson that they would provide a human guide for him but Romney would not be permitted to enter. The brewery had an absolute ban on guide dogs because of Food and Drug Administration regulations on food contamination, employees told him. Johnson elected not to take the tour and subsequently sued the brewery under the ADA.

The court observed that the "marginal increase in contamination risk associated with over 5,000 annual human visitors" to the brewery is greater than the "marginal increase in contamination risk associated with the maximum foreseeable number of annual visits by guide dogs." Noting that FDA regulations state that "pests" may not be allowed in a food plant, the court explained that "pests" refers to "objectionable animals or insects." Romney was not a "pest" since he was regularly bathed and groomed. The brewery does not screen human guests for colds or other signs of disease before permitting them to take the tour, the court added.

From *BNA's ADA Manual* © 1995

Conference attendees settle

Five Pennsylvanians with disabilities settled a lawsuit against the Greentree Holiday Inn in Pittsburgh and the sponsors of a two-day conference held there in 1993. The suit charged that the hotel did not have enough accessible guest rooms – ironically, the conference dealt with assistive technology for people with disabilities. The lawsuit is believed to be the first to attempt to hold conference organizers liable for violations of the ADA. However, because the suit was settled out of court, the issue of conference-sponsor liability will not be argued, said Pamela Berger, the attorney for the plaintiffs who sued the Holiday Inn and the conference's three sponsors: Harmaville Rehabilitation Center, the Rehabilitation Institute of Pittsburgh and the University of Pittsburgh.

Berger said her clients had requested guest rooms with accessible bathrooms. However, they learned upon check-in that there was only one such guest room. In the settlements, Harmaville agreed to adopt a policy of contracting only with hotels that provide fully accessible facilities and to inspect conference venues for accessibility. The University of Pittsburgh agreed to require all future venues to certify in writing that they have accessible facilities, said Berger.

From *Meeting News*, 1994

Burger King to accommodate

Burger King settled a lawsuit brought against it by a woman who is deaf. Terrylene Sacchetti, who claimed the restaurant's drive-through windows were inaccessible under Title III, agreed to the terms of the settlement that required Burger King to develop and install visual electronic ordering devices at drive-through windows of 10 company-owned stores for testing by March 1995. If the devices are successful, the company will recommend that its franchisees and other fast-food companies use them. Burger King also agreed to provide written order forms at drive-through windows and at 100 of its restaurants, and post signs to indicate the availability of the forms. The company also must develop training materials that teach its employees how to serve customers with disabilities.

From *ADA Compliance Guide* © 1994

Hospital, physician owe damages

A doctor and a hospital will pay $512,000 in damages for refusing to admit a man because of his HIV-positive status. A federal jury found that Dr. Charles Hull and Fremont Memorial Hospital (Ohio) were liable for discrimination under the Rehabilitation Act of 1973 and ordered them to pay $62,000 in compensatory damages for pain and suffering. The jury also imposed punitive damages ($150,000 against Hull and $300,000 against the hospital), and U.S. District Judge John W. Potter found that the hospital and the physician violated the ADA.

Fred L. Charon sought emergency treatment at the hospital for a non-HIV-related allergic reaction during a Maine-to-Wisconsin car trip in 1992. He died of AIDS in March 1993, before the case went to trial. His companion continued the litigation as executor of the estate. Hospital officials say they plan to appeal.

From *Disability Compliance Bulletin* © 1995

NFL blackout rule stands

A federal judge ruled that a Cleveland man who is hearing-impaired has no cause of action against the National Football League over its TV blackout policy. The blackout rule prohibits the live local telecast of home football games if all stadium seats are not sold out 72 hours prior to the game. Thomas Stoutenborough claimed that he is discriminatorily prohibited from listening to the game on the radio as other fans do when the game is not televised.

ADA's Title III states that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages or accommodations of any place or public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation. The suit characterized the Cleveland Browns football team as a public accommodation under the ADA because it owns, leases or operates Cleveland Municipal Stadium, a public accommodation, and obtains revenue from the broadcast of games over public airwaves.

U.S. District Court Judge George W. White, in a nine-page opinion granting defendants' motion to dismiss, stated that "televised broadcast of football games is certainly offered through the defendants, but not as a service of the public accommodation. It is all of the services which the public accommodation offers, not all services which *the lessor of the public accommodation offers*, which fall within the scope of Title III. In order for the statute to apply, plaintiffs would have to argue that [the blackout rule] is denying them full and equal enjoyment of services to the stadium."

From *Disability Compliance Bulletin* © 1994

Just who has the disability?

Reprint of an editorial by Audrey S. Chapman which appeared in Small Business News, *Cleveland.*

I recently saw a little boy about eight-years-old help a disabled woman order food from McDonald's. The woman used a motorized vehicle for mobility and had great difficulty talking and using her hands. At one point, she tried to pick up some money, but couldn't grasp the bills. She tried to talk with the counter person, but was misunderstood. Nobody knew what to do.

Meanwhile, the kid took over, ordered for her, counted out change and separated his food from hers so they could sit down and have a good visit.

Too bad kids have to grow up. Too bad adults mar their views. Just think, if wise, experienced, knowledgeable adults let kids act naturally, people would not be *afraid* of the disabled.

So now we've got this ADA thing to deal with. Uncle Sam is making businesses add more parking spaces, build more ramps, hire more people. But gosh, all these changes sure are expensive.

Eyes open wide when you experience the discrimination firsthand. While traveling on business, I stayed with a disabled coworker in a popular hotel chain. Handicapped rooms were available only with one bed. Cots, of course, weren't available. It's assumed, I imagine, that disabled people would have no need for an extra bed. Most don't travel on business or have families. Do they?

Another hotel charged more for its handicapped-accessible room. This room, too, had only one bed – a king-sized model. Towel bars were mounted so high that they were impossible to reach from a wheelchair. Couldn't reach the toilet paper, either. A luxury-style bathtub in shiny colorful acrylic was built on a 2-foot-high platform, making it a physical challenge for even an able-bodied person to get in. Pathetic, isn't it?

The fact of the matter is, enacting change through the ADA won't mean anything until people view the disabled community as people. It's amazing what a wheelchair, or a hearing aid, or a long white cane can do to somebody. Somehow, they aren't *somebody* anymore. People don't see the person. They see the disability.

As my co-worker and I left one of the aforementioned hotels, a group of older ladies walked by. While they situated themselves in an elevator, one lady poked another, gasped and said, "That *poor* girl."

I grinned at her remark, realizing they had no idea how successful and influential she was. I looked at them, smiled and said, "She's just fine."

The ladies were shocked. They just looked at me and the doors closed.

Of laws & lawyers

By Arthur Blaser, assistant dean of the School of Law at Chapman University in Orange, Calif.

I read a dangerous book recently, one that people with disabilities should read, if only to know the enemy. It's *The Death of Common Sense: How Law is Suffocating America*, by Philip K. Howard, published in 1994 by Random House. The book is dangerous because it is so much in tune with the country's mood of killing the patient to avoid the hassles of managing an unwieldy disease. In this case, the patient is society, and the disease is inflexible government regulation and excessive lawsuits.

The book is dangerous because, like every issue of the *National Enquirer*, it contains hundreds of quotable anecdotes and includes what inquiring minds want to know – that law and lawyers are an unmitigated burden. It's dangerous because its extreme examples could keep Rush Limbaugh busy for months. It's dangerous because presidential contenders could use these stories to undermine or repeal important legislation, including the ADA.

One problem is Howard's selective view of history. To hear him tell it, civil rights acts contain good parts that protect individuals from government and bad parts that invite abuse by lawyers and regulators. But the historical facts that Howard omits or cites incompletely could be used to argue that, over time, lawyers have helped make us more humane, and regulators have helped make us healthier.

Howard's flawed logic includes substituting anecdote for argument. Several of his anecdotes deal with OSHA, the Occupational Safety and Health Act. The complaints are familiar: Small business owners are confronted with so many regulations that it's easier to ignore them all. But to see what life would be like without OSHA, a trip to Mexico is sufficient. There, many young females work in manufacturing plants because they are supposedly more compliant. They are subject to a high rate of industrial accidents because the workplace is not regulated.

Many people with disabilities are familiar with the consequences of FDA regulation. We must do without drugs and treatments available in other countries or, if we can afford it, travel to Mexico or Europe. But many others have been disabled by health care providers and drugs that were not sufficiently regulated, or saved from disability by those providers' fears of lawyers and regulation. There are many examples; one is a new generation of thalidomide babies in countries that don't regulate the drug.

The ADA is among Howard's targets, and he criticizes it by citing absurd ADA conflicts. He describes a four-story building that Mother Teresa's Sisters of Charity would have constructed for New York's homeless, if only they did not have to provide an elevator. He revives the debate over New York City's public restrooms, which would have been built if only they didn't have to be made accessible by city ordinance. The message is clear: People with disabilities are responsible not only for governmental budget crises but also whenever someone in New York goes homeless or cannot find a restroom.

The ADA does include some mandates, but most of these are designed to provide choices, not to suffocate them. It would not require the Sisters of Charity or anyone else to install an elevator, but it does require that everyone be given a meaningful choice. It has meant a broader choice for employers and for employees. In many European countries, employers must not only give people with disabilities an equal chance, as the ADA requires, but also meet quotas, which the ADA doesn't require.

Howard bemoans the modern concern with rights: "Rights cede control to those least likely to use them wisely, usually partisans like disabled activists who have devoted their lives to remedying their own injustices." And, we might add, to women, homosexuals, Jews, African-Americans, West Virginians or anyone perceived as different.

No wonder that the ADA was signed into law by an enthusiastic George Bush. No wonder that the U.S. Chamber of Commerce and the National Association of Manufacturers supported its passage. No wonder that those Chicago radicals, Sears Roebuck, found that it took minimal effort and minimal cost to comply. As intended, the ADA does not benefit just one narrow-interest group. It benefits everyone who can now wheel a luggage carrier with a computer and briefcase to work, then enjoy the contributions of a wider range of employers and employees.

Taken together, Howard claims laws such as the ADA supposedly represent the death of common sense. The easy answer is to get rid of burdensome laws and be ruled and regulated by a philosopher king. Unfortunately, no such person is yet a declared candidate for the presidency and until that time, powerful corporations and interest groups will have more influence than regulators and lawyers.

According to Howard, the problem with law, regulation and lawyers is the desire to "conquer human nature." But our experience with civil rights legislation shows that nature is not fixed, that we can learn and grow to become more humane. The law and lawyers are at their best when they encourage inclusion, safety and cooperation.

Given Howard's proclivity toward argument by anecdote, perhaps the best way to respond to his book is with another anecdote. I am a former marathon runner who visited a chiropractor in May 1993 and left as a quadriplegic. Although I received a default judgment of nearly $7 million against the chiropractor, I have not seen – and do not expect to see – a penny from him. Another of his patients also suffered a brain stem stroke. Her family recovered nothing in their suit for her wrongful death.

Why? There are not enough laws. No law requires chiropractors to carry insurance. As a result, many are uninsured or underinsured. In their case, as in many cases in our society, lawyers and regulators can contribute more to common sense than is easily recognized.

From *New Mobility*, September 1995

Accessibility

ACCESSIBILITY HIGHLIGHTS

What is ADAAG?

ADAAG stands for *ADA Accessibility Guidelines*. The guidelines are the design requirements ensuring that buildings and facilities are accessible to people with disabilities. They are written by the U.S. Architectural and Transportation Barriers Compliance Board.

What do the accessibility guidelines apply to?

All new buildings and all alterations to existing buildings. An alteration is any change that affects a building's usability. Example: A new front door would have to meet accessibility guidelines but a new heating system wouldn't.

Are elevators required?

- business: yes, in buildings of three stories or more or 3,000 or more square feet per floor; yes, in all shopping centers/malls, health care providers offices, and public transportation stations regardless of size; no, in all other buildings.
- government: yes. (See "What is program accessibility?" on page 54.)

What is required?

Here are some of the requirements for new construction:

- public entrances: at least 50 percent must be accessible.
- accessible routes: must connect accessible public transportation stops, parking, passenger loading zones, and public streets/sidewalks to all accessible features and spaces in a building.
- bathrooms: must be accessible, with one accessible stall if there are fewer than six stalls, and two accessible stalls when there are six or more.
- emergency rescue: any floor without a supervised sprinkler system must include an "area of rescue assistance" that has direct access to an exit stairway where people who cannot use stairs may wait for help in an emergency.
- telephones: one teletypewriter inside a building with four or more pay phones.
- assistive listening: fixed-seating meeting spaces for 50 or more people or with audio-amplification systems must have a permanent assistive listening system.
- automated teller machines: where provided, at least one must be accessible.
- fitting/dressing rooms: at least five percent (a minimum of one room) must be accessible.

What is not required?

- to totally retrofit every existing building.
- elevators in buildings under three stories or with fewer than 3,000 square feet per floor (except shopping centers/malls, health care providers' offices and public transportation stations regardless of size).

Barrier removal & program access

True access is more than just getting through the door

By Ken Campbell, director of Disability Policy Studies at the Nisonger Center, Ohio State University

Not so long ago accessibility was considered by many to mean "ramps and restrooms." Today, a relatively new concept in access is flourishing. People with disabilities are expecting not just to get into a building where an activity takes place, but also to be provided full participation in that activity.

This concept is called "program access." Any goods or services offered to the general public must be made available to people with disabilities, according to Titles II and III of the ADA. There are many ways to accomplish this. The following examples illustrate that barriers can be overcome using common sense and program access.

When services are offered from an inaccessible office, is our only alternative to remodel the office and make it accessible?

No! In some instances it is much easier to relocate the service to another area of the building that is already accessible.

When a public performance, such as a play, is offered with multiple showings, must each performance offer interpreters for audience members who are deaf?

No! You can achieve program access by identifying and advertising specific showings at which interpreters will be available.

Other ways of making performances available to individuals with sensory impairments include amplification devices such as FM loop systems for people who are hard-of-hearing and audio description of the background action for audience members who are blind.

Many businesses rely on the printed word to describe products or services. This method is not very effective for consumers who are blind or visually impaired. Options such as large print, audiotape or Braille information should be considered to solve this problem.

What about the issue of store size and product handling as barriers to those customers with limitations in mobility, grasping or carrying?

Several large retail and grocery stores have discovered ways to address this issue. Motorized scooters for customer use are beginning to appear in large stores. Carts that attach to wheelchairs are common in grocery stores, and some places even make reaching devices available to help people in wheelchairs get products from upper shelves.

Restaurants have adapted both table height and table location to accommodate mobility concerns. Some provide Braille menus, while others have instructed wait staff to read menus to customers when necessary.

There are many more examples of program access, but what it really comes down to is: *How creative can you be in making your product or service available to all your potential customers?*

People with disabilities make up a substantial market share, which increases as our population ages. Why would any business want to reduce its sales potential by 10 percent or more just to retain inaccessibility?

The cost of program access is often incredibly small. For businesses that qualify, the expense is reduced by a federal tax credit. Providing program access is an inexpensive, easy way to expand the market for any business.

Q How wide should doors be?

A Doors must have a minimum 32 inches clear width in the *open* position. A standard 32-inch swinging door will not meet the requirement unless it is installed with special hinges.

Choosing a consultant? You'd better shop around

By Rae Duncan Lyle, Cleveland

It would seem that there is no end to the number of ADA consultants loose among us. Some claim to be certified. Many claim that they were instrumental in getting the ADA passed. It is a little like the number of people who were supposedly on the raft with downed World War I ace Eddie Rickenbacker. A small cruiser would be needed to hold all the people who claimed to have been with him.

For 20 years, there has been legislation requiring equal opportunities for people with disabilities in employment, education, programs and activities. The catch was that this legislation applied only to federally-funded programs and activities. During Revenue Sharing Days, recipients of federal funding were "encouraged" to make their programs and activities more accommodating to people with disabilities by a threat of withholding revenue sharing monies. In those days (the early '80s), an agency was considered well paid if it was reimbursed for mileage for an accessibility survey. Now, people are getting big bucks for this work; yet, many of these consultants do not have a clear understanding of the ADA or its intent, misinterpret the regulations and know very little about discrimination.

If you need an ADA consultant, choose that person as

carefully as you would choose anyone who is going to provide a service for you. Don't be afraid to ask questions and don't hesitate to demand references from these individuals. Get estimates from several consultants. Ask specifically what their fees include. Determine what their educational credentials are, how long they have been in the ADA business and what knowledge they have of disability. Other questions you should ask of an ADA consultant include:

- How many architectural barrier surveys have you conducted?
- What are the most important elements that you look for in determining facility accessibility?
- What is the difference between compliance and usability?
- Have you had training in advocacy, disability rights and architectural accessibility?

Some ADA regulations are a bit vague, which means that clarification will have to come through the courts. This is a slow process. To help ease the pain and frustration of compliance, the feds have invested considerable time and money through grants to establish ADA resource centers around the country. The Disability Rights Education and Defense Fund, Inc. has provided ADA training to approximately 800 people in the disability community. The National Institute on Disability and Rehabilitation Research) has established regional and state Disability and Business Technical Assistance Centers to assist the business community. Through the Equal Employment Opportunity Commission and Department of Justice (DOJ), regional arbitration centers will soon be in operation to work on disputes and keep litigation to a minimum.

Independent living centers play an important role as a resource in this scenario, and the DOJ recognizes this by referring ADA inquiries to the nearest center.

Each accessibility project has its own individual challenges. Your best strategy will involve the same methods used for any project: interviewing consultants, weighing their responses and checking their references.

Lyle wrote this article in 1994 while accessibility services coordinator, Services for Independent Living, Inc.

Beware of inspection scams

Federal officials have uncovered a scam in which hundreds of people spent millions of dollars buying phony ADA inspector licenses. But the real losers could end up being the businesses who were told by these faux inspectors to make modifications that weren't necessary.

A sham company, National Consulting Institute, Inc., sold the fake licenses, which they said would make investors "certified and licensed ADA inspectors," according to officials, who stressed that no such licenses are authorized under the law.

While approximately 800 individual victims of the scam will be given partial restitution for their losses, business owners will receive no money to cover the expense of making unnecessary accommodations.

If you own or operate a business or are the legal representative of one, be sure to check the references of anyone claiming to be a consultant on ADA-related issues. If you have received information that you would like to verify, or simply want to learn more about the ADA, call the Justice Department's ADA information line at (800) 514-0301 voice or (800) 514-0383 TTY, or one of the Justice Department's 10 technical assistance centers.

From *Successful Job Accommodation Strategies* ©1996

Q When are automatic doors required?

A They aren't. The only requirement established for door-opening is that interior doors must be operable with a maximum of five pounds of force; no maximum has been established for exterior doors. This is the question that should be addressed: Is the door accessible to a person with limited mobility and/or strength? If not, alternatives must be considered, such as providing assistance from a lobby receptionist or installing electric or automated openers.

Sign language interpreters can aid communication flow

By Ben Hall, RSC interpreter coordinator

Communicating with individuals who are deaf often involves working with an interpreter. This situation does not have to be awkward or stressful. When armed with the right information, the experience can be gratifying and successful for everyone involved.

The term "interpreter" has different meanings to different people. In this article we use the term as it relates to the communication between people who do not share a common language. It is important to remember that interpreters help *all* the participants, both deaf and hearing. Their basic purpose is to facilitate communication between parties with different languages by translating the thoughts, emotions, nuances and cultural information inherent in all languages from one speaker to another. Interpreters are cross-cultural mediators.

There are a variety of communication modes or language preferences among people who are deaf. This further complicates the process of communication with this cultural group. Not all people who are deaf share a com-

mon language. Just like people who can hear, they have different languages. These may include American Sign Language, signed English, cued speech, oral, SEE1, SEE2 – and the list goes on and on and on.

Another important fact is that interpreters are human beings just like the rest of us. This is often overlooked by consumers as well as by interpreters themselves. In their struggle to accommodate the needs of consumers, interpreters sometimes sacrifice their own personal needs. Some struggle with the pain of carpal tunnel syndrome or otherwise risk their health by interpreting non-stop because if they would cease interpreting, the communication would end. Please be conscious of the fact that interpreters need your consideration. They may need to take a break or get a drink of water.

Awareness created by the ADA has caused a shortage of qualified interpreters. The best way to ensure that you will have interpreters available is to make arrangements EARLY! For small meetings, two weeks in advance will be safe. For large conferences or meetings that require multiple interpreters, at least a month should provide adequate time to locate qualified services.

In general, interpreters will arrive 15 minutes early, or earlier if the situation involves multiple interpreters and consumers. The purpose for this timing is to allow the interpreters and consumers a chance to assess the situation, the language/terminology needs, the logistics and any other special issues that help facilitate the communication.

The physical layout of the room will be assessed to determine the most appropriate seating and placement to maximize the lines of sight. Some factors that influence the communication environment are lighting, room setup, number of participants who are deaf, number of participants who are hearing, location of windows and doors, color and design of the background or wallpaper, public address systems, assistive listening devices, audiovisual equipment, and location of the speaker and audience. Necessary changes will be made such as closing the blinds, moving a chair or turning on a light.

There may be times when an interpreter will ask for additional information in advance to prepare for an assignment. For example, if the situation involves a lecture or presentation, an advance copy of the speaker's remarks or an outline of the presentation is very helpful. If the assignment involves technical information, it is helpful for the interpreter to have a list of technical or specialized terminology and any other materials that may be discussed ahead of time. Acronyms can be somewhat troublesome, not only for interpreters but for others as well. You might consider providing a list of the most frequently used acronyms before the assignment.

Difficulties can also result when handouts are distributed during a meeting. Some presenters immediately begin discussing the material. An individual who is deaf is unable to pass the papers, read the material and look at the interpreter at the same time. The best way to resolve this situation is to simply pause briefly until the material is completely distributed and everyone has a chance to look it over.

Another perplexing phenomenon for interpreters is the idiom. Idioms are words or phases that have a meaning different from the literal meaning. Often these words or phrases have double or triple meanings. Unfortunately, because interpreters focus on the concepts of the message, there are times when these multiple meanings will be lost in the translation.

Finally, when talking to someone using an interpreter, it is best to speak directly to the person who is deaf – do not say,"tell him/her." Simply talk as if the interpreter were not there.

These are only a few of the issues that need to be considered for interpreters to provide you with the best services possible. If you work together as a team and are aware of the needs of others, you will have a great communication experience. For an information sheet on organizations that provide interpreting services, call Ben Hall at (800) 282-4536, ext. 1288 voice/TTY.

When are visual alarms required?

They are required only where there are audible alarms.

When hearing aids aren't enough, people may need auxiliary aids

The ADA states that: *"Public accommodation must provide auxiliary aids when they are necessary to ensure effective communication with individuals with hearing, vision or speech impairments."* To enhance communication with someone who is hard of hearing, a variety of devices are available. Some devices work with hearing aids and some work independently. This article will try to provide an overview.

Alerting systems

These devices use lights or vibrations to alert someone of the presence of an audio alarm or signal. They may be wired to another device, such as a doorbell, phone, alarm clock or baby monitor, or activated by another means – for example, smoke or voice. When the alerting system is wired to more than one signaling device, simple codes (number of light flashes or vibrations, for example) tell which device has been activated. In some cases the loudness of the signal is increased or its tone is changed to a range that a particular person can hear.

Telephones and hearing aids

Telephone pick-up coils in some hearing aids will bring the sound directly from the electrical system within the telephone to the hearing aid, eliminating environmental sounds. Not all hearing aids are equipped with a "tele-

phone switch" to activate this device, and not all telephones are compatible with telephone pick-up coils in hearing aids.

When a person's hearing aid has a telephone switch, but the telephone system doesn't have the sufficient linkage to activate it, a telephone adapter can be used. This is a portable device that slips over the telephone earpiece and generates a magnetic field to which the hearing aid telephone pick-up coil can respond. This portable amplifier doesn't work with all telephones.

Some phones have amplifiers built into the handset to control the volume and strengthen the signal. They can usually be used with or without a hearing aid. Amplified handsets in public telephones are identified with a telephone access sign.

Telephones with text options

Telephones equipped with keyboards are called text telephones, teletypewriters or telecommunications devices for the deaf, often referred to as TTYs. To receive a direct call from a TTY, you must also have a TTY. A text telephone can be connected to a regular telephone line and utilize the same phone number. When someone with a text telephone calls, the voice phone rings normally, but when answered, only a series of beeps will be heard. When you put the receiver in a cradle on your TTY, the two lines will be connected. Bcan then type messages on their respective TTY keyboards. The TTY display window relays what the person on the other end is typing, and when you respond, your message appears in the window. A printout of the conversation is also made on a paper tape, which you can save and refer to or tear off and throw away.

Telephone relay services

If one person is using a text telephone and the other party has a regular voice phone, they can have a conversation via the Ohio Relay Service. The text telephone user calls the service and reaches a communication assistant, who places the call to the voice number. The assistant reads aloud exactly what the TTY caller types to the hearing person and then types that person's verbal responses back to the TTY-user exactly as vocalized. The process works in reverse when a hearing person wants to call a person with a text telephone. To access the Ohio Relay Service, call 1-800-750-0750. A communication assistant can explain the process before placing your call.

Assistive listening systems

People with hearing impairments need to be able to differentiate between background noise and the voice of the speaker in a meeting, auditorium or theater. A limitation to hearing aids is that they tend to amplify all sounds equally. Therefore, whenever the source of the sound is distant, as from a stage, podium or another room, closer noises may be distracting and reverberation – the echoing of sound back and forth from one surface to another – may interfere with the main signal.

People who are hard of hearing can attempt to solve this problem by sitting close to the speaker. However, it may not be possible to get close enough to eliminate the effects of noise and reverberation.

Alternative listening devices can amplify the main signal and make an enourmous difference by eliminating background sounds that interfere. The key is locating a microphone closer to the sound source. From there the signal is transmitted by way of wire, radio waves or light beams to a listening device worn by the person with a hearing impairment. This brings the talker closer to the ears of the listener and provides a much clearer signal than a personal hearing aid alone.

Some of these devices work only with hearing aids that are equipped with a "telephone switch" or telephone pick-up coil, as mentioned earlier in "Telephones and hearing aids."

Hard-wired systems have an audio amplifier that is wired into headphones or to a remote loudspeaker. These systems are less popular because they restrict the person with a hearing impairment to a specific location.

An AM or FM **radio system** uses low-power transmitters attached to sound amplifiers that broadcast within the immediate area to either personal hearing aids equipped with telephone pick-up coils or specially designed radio receivers. These systems are subject to strict power and frequency restrictions by the Federal Communications Commission. The user can leave the immediate area of the signal and still receive sound clearly.

In a typical induction **loop system**, a loop of wire encircles the assistance area. An audio amplifier drives the loop, producing a magnetic field. Some hearing aids contain an induction coil that responds to the magnetic field – this is the telephone pick-up coil feature.

Infrared systems use wavelengths that are just below the visible spectrum. Users of the system wear an infrared receiver, which must be in direct line with the infrared transmitter to receive the signal.

Captioning

Any video production can be captioned to include the people in your audience who have hearing loss.

Decoders which are either built into or attached to **television sets** allow the viewer to read captions on the TV screen. Selected programs now carry this signal which is invisible unless you have a decoder. The invisible signal is referred to as "closed captioning." The decoder is standard in televisions larger than 15 inches manufactured after July 1993.

Some films and videos can be purchased with closed or open captioning. When a program is open captioned, the signal and captions are visible on the screen at all times and cannot be made invisible.

Real-time captioning is live. It allows the spoken word to be seen on an overhead screen or video monitor as a presentation is made. Real-time captioning is done by stenocaptioners using computers to transcribe and instantaneously display subtitles on a video monitor or large

projection screen. It is easily hooked into the audiovisual equipment that is normally used for large plenary sessions at conventions. Small workshops and concurrent sessions can be accommodated easily with a video camera, VCR and monitor connected to the captioner's equipment.

Captioned presentations can also improve comprehension for people with learning disabilities or those for whom English is a second language. Furthermore, a draft of the transcribed material can be printed (in regular text or Braille) or saved to a computer disk to provide a record of the proceedings.

Other options

Office technology is changing the way we all communicate. Fax machines and electronic mail via computer are especially useful to people with hearing difficulties.

People who are fluent in sign language often prefer "live" interpreters even if they have some hearing or can use devices that work with hearing aids. Whenever you plan events, productions or important discussions, ask your participants what they need or request technical assistance from disability organizations. Helpful organizations include local speech and hearing centers, and community centers for the deaf or hard of hearing.

– T.S.

Portions of this article are from *Hearing Aids: A User's Guide* by Dr. Wayne J. Staab, Phoenix, AZ, and from The Caption Company, Marietta, GA, (770) 952-4019.

Q What slope is required for ramps?

A One inch of vertical rise for every 12 inches of horizontal run. This is the steepest slope allowed; a more gradual slope is desirable when possible.

Q Is there a maximum ramp length?

A No. However, the maximum rise for any run is 30 inches. At that point there must be a level landing (at least as wide as the ramp and at least 60" long) before continuing up again.

Q Where should handrails be placed?

A The height of ramp and stairway handrails must be 34 to 38 inches from the ground.

Alternative formats needed to communicate when vision limited

When thinking of access issues, most people begin with removal of architectural barriers. However, there is more to equality than physical access. Sometimes the question is not, *How will an individual get through the door?* but, *How can we communicate effectively?*

Public accommodations covered under Title III of the Americans with Disabilities Act are required to provide auxiliary aids and services necessary to ensure that no individual with a disability is excluded, denied services or otherwise treated different than other individuals. This article will focus primarily on providing printed materials in alternative formats for people with visual impairments.

Braille

Often, people jump to the conclusion that Braille is the answer to accommodating someone who is totally blind. The fact is that less than 10 percent of people who are legally blind ever learn to read Braille. Also, there are different grades of Braille. If you have text materials printed in grade 2 but the person who needs to access the text reads only at the grade 1 level, you will not communicate.

Providing documents, menus, directions, account statements and the like in Braille is a wonderful idea and should not be discouraged. However, it is not always the answer. Furthermore, the cost and time involved in purchasing a Braille printer and training someone to use it or contracting the work out to a Brailling service could be an "undue burden" to some organizations.

Audiotaping

A common and relatively inexpensive alternative for people who cannot read print is audiocassette. Audiocassette versions of printed materials can also be useful to people with disabilities other than blindness. People who have physical disabilities that prevent them from turning pages can benefit from this format, as can people with a learning disability such as dyslexia, which makes reading difficult.

For optimum quality, have master tapes of your printed materials created by audiotaping professionals. Long documents should have "tone indexing" to help the listener skip forward or backward to certain items. Tone indexing is the placement of an electronic beep at the beginning of a chapter or section. This feature requires playback equipment that will play and fast forward at the same time.

In lieu of hiring a professional to audiotape, creative solutions can be found. One school system in Ohio regularly receives assistance from inmates at the local penitentiary, who read textbooks onto tape.

Computer disks

If the person you need to communicate with owns a personal computer with software that reads the screen aloud via a voice output peripheral, you may be able to supply the individual with a computer disk that contains

the document file. You would need to check the compatibility of your respective systems. However, with the right conversion software you can even translate Macintosh-created documents to MS-DOS-based systems and vice versa.

Large print documents

Formatting documents in large print is another method of effective communication with people who have visual problems. These tips will help:

- Type is measured in point increments. This is 14-point type and is considered large print.

  However, this paragraph is set in 18-point type, which is recommended.

  Anything larger than 18 points is considered too big. As a guide, one page of standard 11-point type equals three pages of 18-point type.
- Off-white or yellow paper is the best for readability for people with or without visual difficulties. Paper should be no wider than the standard 8-1/2 x 11 inches. Columns of type wider than six inches will not track well for people who use a magnifier.
- Setting text with left-margin justification only, also called "ragged right," (as in this paragraph) is usually preferred because setting both right- and left-margin justification produces uneven spacing between letters and words. Also, avoid centered text.
- Don't type text in all capitals.

Mailing "free matter"

A wide variety of material can be mailed postage-free if it is sent by someone who is blind or who cannot use or read conventionally-printed material because of a physical disability. In most cases the person receiving the mail must be unable to read standard print as well.

Individuals, libraries and other noncommercial organizations serving eligible persons may mail certain materials to eligible persons and to organizations serving eligible persons free of postage. To qualify, the material cannot contain any advertising, and it is subject to inspection by the Postal Service. It must be in large print, Braille or audio form. Handwritten or typewritten letters are always subject to the applicable rate of postage.

For complete information, contact your post office for Publication 347, "Mailing Free Matter For Blind and Visually Handicapped Persons: Questions and Answers."

Planning for alternatives

Public accommodations covered under Title III and state and local governments under Title II must provide auxiliary aids when it is not an undue burden to do so. The proliferation of personal computers has made it easy to turn documents into large print, send them to a Braille printer or even supply a disk copy to someone. It is not necessary that *all* documents automatically be prepared in *all* formats, but businesses and organizations should have a plan for making alternative formats available. Ask your consumers what they need, and evaluate what you can reasonably supply to them in accordance with the law. Simply reading information over the phone may suffice. It is advised that all your printed documents carry a statement of what alternative formats are available.

– T.S.

Specs for children's facilities

In a joint rulemaking with the U.S. Department of Justice, the Access Board published a notice of proposed rulemaking (NPRM) on July 23, 1996, to add a section to the Americans with Disabilities Act Accessibility Guidelines (ADAAG) on access to facilities used primarily by children. Once final, the long-awaited Section 15 will specify how to provide access in those places where usability by children is of primary importance, such as in day care centers or elementary schools.

Section 15 will not address play settings or fixed play equipment; these will be addressed in the rule on recreation facilities currently being drafted by the regulatory negotiation committee.

While ADAAG is based on adult dimensions and anthropometrics, the ADA clearly does not intend that a toilet room used only by small children be equipped with fixtures they cannot reach. The same applies to the sinks, fixed tables and other features found in many classrooms, children's museums or other children's facilities. In the absence of specific guidelines, most design professionals have used the "equivalent facilitation" provision (Section 2.2) and applied best practices in order to design facilities that are usable by children with and without disabilities. Others, however, have been hesitant to depart from the ADAAG requirements. Once final, Section 15 of ADAAG will alleviate this problem by providing specific guidelines for these facilities.

The proposed guidelines balance usability by children with usability by adults. They also take into account that facilities designed to allow access for a two-year-old may not always allow equal access for a 10-year-old. In some cases, such as with reach ranges, requirements are specific to the age group for which the facility is constructed. These requirements often overlap so that facilities may be designed for use by children of a broad age range. The board has also taken great care to balance the legitimate cost concerns of business with access for all children.

A copy of the proposed rule (publication S-25: Children's Facilities Notice of Proposed Rulemaking) can be obtained by calling the Access Board's automated publications order line at (800) 872-2253, then by pressing 1, and 1 again; or (800) 993-2822 TTY.

From *Access Currents*, July/August 1996

resources

Checklist, guides can help determine accessible features

Are your organization's physical facilities already built, full of inaccessible features; or are you still looking at paper dreams? If the latter, you are in some ways more fortunate; if the former, remember that you are a member of a very large club, and then get busy.

The "Checklist for Existing Facilities" is not new, but it remains one of the best instruments for assessing your building. It is not comprehensive but instead focuses on the structural priorities given in the Department of Justice's regulations for public accommodations. Thus, using it – even correctly – is no guarantee that your facility will be accessible. But it is readable, reasonably small (12 pages) and user-friendly.

The checklist was developed by Barrier Free Environments, Inc., and Adaptive Environments Center, Inc., for entities covered by Title II (government services) and Title III (privately-owned business and services).

Barrier Free Environments has also issued installments in the Tech Sheet Series on specific areas of building accessibility under a grant from the National Institute on Disability and Rehabilitation Research. The series covers: Medical Care Facilities, Areas of Rescue Assistance, Accessible Routes, Doors, Toilet Stalls, and Lavatories and Mirrors.

All these items are available for a nominal fee from the Great Lakes Disability and Business Technical Assistance Center; (800) 949-4ADA.

RSC offers accessibility advice

Marilyn Sydow, facilities planner for the Ohio Rehabilitation Services Commission, wrote several columns for the agency's official publication, *NewsNet*, which pertain to accessibility requirements of the Americans with Disabilities Act Accessibility Guidelines. The articles and accompanying diagrams were compiled as a 12-page booklet and cover: doorways, entrances, parking, toilet stalls, lavatories, urinals, drinking fountains, signage and ramps. Copies of *Accessibility Bits* (Catalog No. B-33) are free from RSC, (800) 282-4536, ext. 1470 voice/TTY.

Illustrated handbook printed

Access for All contains dimensions and design tips for building or renovating facilities to be barrier-free. The handbook explains the law in simple language and offers cost-efficient suggestions for accessibility. Call the Governor's Council on People with Disabilities; (800) 282-4536, ext. 1393 v/TTY.

Bulletins available on surfaces, parking, visual alarms, etc.

Two ADA pamphlets, *Bulletin #4: Surfaces* and *Bulletin #6: Parking* are available from the U. S. Architectural & Transportation Barriers Compliance Board (Access Board). *Surfaces* explains what surface characteristics are required for accessible wheelchair routes and covers slip resistance, surface materials and surface conditions. *Parking* provides additional explanation on parking requirements contained in the ADA Accessibility Guidelines.

The Access Board also has bulletins on *Detectable Warnings, Visual Alarms, Text Telephones,* and *Using ADA Accessibility Guidelines*.

Help with signage compliance

Do you own a commercial building? Are you a facility manager? Do you operate a restaurant or a retail store? If so, you may have questions about making your buildings' signs comply with the ADA.

An excellent resource called *Signs and the ADA* was written by Sharon Toji, who consults frequently with the Architectural and Transportation Barriers Compliance Board and has years of first-hand experience in the sign business. The manual includes a plain-English description of the regulatory requirements (carefully referenced to the *Federal Register*), a signage checklist, an ADA primer and a question-and-answer booklet. It is available in four versions: "For Sign Fabricators;" "For Architects and Designers;" "For Facilities Owners or Managers;" or "For Sign Users Who are Disabled."

Although the manual is neither official guidance nor legal advice, it will help you make good faith efforts to comply with the law. A quarterly newsletter and a toll-free consultation service are also available. Contact: Access Communications, 15320 S. Broadway, Gardena, CA 90248; (301) 323-5210.

Vertical access information

Elevator World Inc. of Mobile, AL, has published *ADA and Vertical Transportation: A Handbook on Accessibility Regulations for Elevators, Wheelchair Lifts and Escalators*. The 144-page handbook provides extensive coverage of accessibility requirements for vertical transportation and is a resource for the vertical transportation industry, building owners/managers, architects, code enforcement officials and accessibility organizations.

It was written by code and safety consultant Edward A. Donoghue, CPCA, and costs $45 plus $5 postage. Contact: Elevator World Inc., P.O. Box 6507, Mobile, AL 36660; (334) 479-4514, ext. 119.

resource

Catalog of modification costs

Your buildings are not in compliance with the ADA Accessibility Guidelines and nowhere near accessible. The thought of retrofitting sends a chill up your spine. Not knowing the actual cost of building modifications, you assume your business can't afford it.

The ADA Cost Catalog for Access Modifications was written to meet your need for detailed information on construction and costs. This large-format, 200-plus page book describes in detail more than 50 common accessibility modifications, complete with clear drawings and even pricing information. It was produced by Adaptive Environments Center, Inc., for the National Institute on Disability Rehabilitation and Research.

If you have facilities that need to be modified, you will find this a valuable resource to learn how to: install or modify curb cuts, modify existing stairs, install raised and Braille characters (in an elevator), create accessible toilet stalls or install assistive listening systems, to name just a few examples.

In eight pages, the section on "existing double-leaf doors" offers 12 different estimates that take into account whether the opening that must be widened is in a masonry or a stud wall, whether the new door will be solid wood, hollow wood or metal, and whether one or both existing doors will be replaced. Separate estimates are given for removal of doors, installation of an automatic door opener and installation of magnetic hold-open devices. Not all subjects rate such a thorough treatment, but then not many concerns are more important than getting through the door.

Each estimate itemizes materials and labor that, in the final figure, includes the general contractor's overhead and profit. A National Cost Index lists figures for 30 cities including Cincinnati, Cleveland and Columbus. When used as multipliers, these give a final cost that is fine-tuned to your own region. Any publication that gives price estimates is soon out of date. But even a few years from now, with consideration given for inflation, it will help you determine reasonable cost. Buy it for $35 from: LRP Publications, Dept. 400, 747 Dresher Rd., Suite 500, P.O. Box 980, Horsham, PA 19044-0980; (215) 784-0860 voice or 784-9639 fax.

– D.C.

Telecommunications Reform Act addresses disability access

Television broadcasters will have to make their programming accessible to people with vision or hearing impairments through the use of closed captioning or video description, under the Telecommunications Reform Act of 1996. The act, signed into law Feb. 8, also requires telecommunications equipment manufacturers and providers to ensure that their equipment and services are accessible to people with disabilities, if readily achievable as defined under the ADA.

These are the two major provisions of the act that pertain specifically to accessibility for people with disabilities. The new law also includes four provisions intended to promote broad access to telecommunications in general. Although separate from ADA, the two acts will be interdependent.

The Telecommunications Act – the first major overhaul of telecommunications law in almost 62 years – will affect local and long distance telephone services, cable programming and other video services, broadcast services and services provided to schools.

Reed Hundt, chairman of the Federal Communications Commission, said that with the signing of the Telecom Act, "the future has never looked brighter for people with disabilities.... It's now up to the FCC to implement the new telecommunications law."

The provision on "video programming accessibility," Section 305, ensures that video services are accessible to people who have hearing disabilities or visual impairments. To implement this section of the law, the FCC will conduct a study to determine the availability of closed captioning and establish a timetable to make closed captioning more widespread. In addition, the FCC will look into the availability of video description so people who have visual impairments can hear a description of what they cannot see, Hundt said.

"Interconnection" is required under Section 251 of the act, meaning that telecommunications carriers must be able to interconnect with other carriers and not install features that would impede accessibility.

The "universal service" provision under Section 254 of the new law requires accessibility to basic telecommunications service for all Americans. Under universal service, low-cost, urban telephone subscribers and business customers subsidize high-cost, often rural, subscribers. This provision previously was meant to address needs of people living in rural areas, but it is interpreted to include people with disabilities, schools and health care institutions, according to an FCC spokeswoman. That includes providing affordable rates and discounts. Moreover, the law provides recommendations on what constitutes universal service and what should be covered.

From BNA's *ADA Manual* © 1996

Resource Recap

Disability & Business Technical Assistance Center (DBTAC)

Approximately 100 publications related to the Americans with Disabilities Act are available through the Great Lakes DBTAC located at the University of Illinois in Chicago. At least 15 of those items are available in Spanish-language translation. A nominal fee is charged for orders. Call (800) 949-4ADA voice/TTY and ask for an order form.

The ADA-OHIO information project is a branch of DBTAC located in Columbus. For resource materials, telephone technical assistance or educational workshops, call (800) ADA-OHIO voice, (800) ADA-ADA1 TTY, or e-mail to ADA-OHIO@ix.netcom.com.

Below is a list of the materials available through DBTAC which were featured in this Sourcebook:

Definition of disability issued by EEOC, p. 17
ADA Enforcement Guidance: Pre-Employment Disability-Related Questions and Medical Exams, p. 17
"A Guide for Approaching Job Descriptions and Determining Qualifications," p. 17
"A Guide for Interviewing," p. 17
"A Guide to Selected Forms of Accommodations: Rescheduling Work Hours, Restructuring a Job or Reassigning Employees," p. 17
"A Guide to Selected Forms of Accommodation: Modified and Specialized Equipment," p. 17
"Implementing the ADA" series, p. 25
Emergency Procedures for Employees with Disabilities in Office Occupancies, p. 27
"Work-site Accommodations for People with HIV," p. 30
"Reasonable Accommodations for Persons with HIV Illness," p. 30
ADA Accessibility Guidelines, p. 70
"Checklist for Readily Achievable Barrier Removal – Existing Facilities," p. 77
Tech Sheet Series on specific areas of building accessibility, p. 77

Ohio Rehabilitation Services Commission (RSC)

RSC maintains **a catalog of publications and videos** available from its Office of Public Information. All publications are free and many are available on audiocassette. Videos may be borrowed at no charge, but must be returned by insured first class mail or UPS. For a catalog or to reserve a video, call (800) 282-4536, ext. 1470 voice/TTY, or (614) 438-1470 voice/TTY. The following videos are recommended for people interested in learning more about the ADA.

Reasonable Accommodations of the Enabling Kind
The Americans with Disabilities Act: New Access to the Workplace
Work in Progress
Beyond Compliance: Serving Customers with Disabilities
Open for Business
A Warm Welcome (recommended for restaurants)
Now Serving... Every Customer
Accessible Design: Americans with Disabilities Act Accessibility Guidelines
A Challenge to America (basic overview of the ADA)
The Ten Commandments of Communicating with People with Disabilities

Nine articles by ADA Coordinator David Cameron which are included in this Sourcebook are available as **reprinted flyers**. For copies, call (800) 282-4536, ext. 1232 voice, ext. 1470 TTY.

Direct Threat, p. 34
Defining Essential Functions, p. 18
Enforcement, p. 41
Family and Medical Leave Act, p. 50
Medical Exams and Inquiries, p. 15
Reasonable Accommodation: A Sample Policy, p. 21
Substance Abuse, p. 38
Tax Incentives, p. 13
Who is Covered?, p. 5

In 1996, RSC established an **Employer Services** section to serve the business community in Ohio. For information and assistance in hiring qualified people with disabilities, contact Manager Ben Green at (800) 282-4536, ext. 1216 voice, Assistant Manager Cathy Cain at (937) 372-4416 voice/TTY, or Placement Supervisor David Leedy at (614) 438-1287 voice.

Resources featured in the Sourcebook

Access Communications, 15320 S. Broadway, Gardena, CA 90248; (310) 323-5210
Signs and the ADA (signage compliance), p. 77

ADA-OHIO information project; (800) ADA-OHIO voice, (800) ADA-ADA1 TTY
e-mail address: ada-ohio@ix.netcom.com

American Foundation for the Blind, ADA Consulting Group, 15 W. 16th St. New York, NY 10011; (212) 620-2047; 1-800-545-2433
consulting groups, p. 65
AFB Government Relations Department, 1615 M St. N.W., Suite 250, Washington, DC 20036
self evaluation checklists, p. 65
Of Consuming Interest: A Guide to Titles II and III of the ADA for People with Vision Loss, p. 65
Memorandum on the Obligation of Health Care Providers Under the Americans with Disabilities Act, p. 64

American Hotel and Motel Association, 1201 New York Ave. N.W., Suite 600, Washington, DC 20005-3931; (202) 289-3100
Accommodating All Guests, p. 65

American Library Association
Order Department, 50 E. Huron St., Chicago, IL 60611; (312) 280-5108 or (800) 545-2433.
The Americans with Disabilities Act: Its Impact on Libraries, p. 60

Annenberg Washington Program in Communications Policy Studies
Internet address: http://www.annenberg.nwu.edu
The Americans with Disabilities Act: Putting the Employment Provisions to Work, p. 14
Communicating the Americans with Disabilities Act, Transcending Compliance: A Case Report on Sears, Roebuck and Co., p. 31

Arc National Headquarters; (800) 433-5255
Call Wanda Trigg for information on the National Employment and Training Program, p. 14

Architectural and Transportation Barriers Compliance Board (Access Board), 1331 F St. NW, Suite 1000, Washington, DC 20004
Publications order line: (800) USA-ABLE (872-2253) voice, (800) 993-2822 TTY
Bulletins on Surfaces, Parking, Detectable Warnings, Visual Alarms, Text Telephones and Using ADA Accessibility Guidelines, p. 77
Proposed guidelines for childrens' facilities, p. 76

Association on Higher Education and Disability, P.O. Box 21192, Columbus, OH 43221
Title by Title: The ADA and Its Impact on Postsecondary Education, p. 60

Building Owners and Managers Association, (800) 426-6292
The ADA Answer Book, p. 65
The ADA Video, p. 65

The Caption Company, 1730 Sands Place, Marietta, Georgia 30067; (770) 952-4019
captioning, p. 74

Council of Better Business Bureaus' Foundation, Dept. 024, Washington, DC 200042-0024; (703) 247-3656
"Access Equals Opportunity" industry-specific ADA compliance guides, p. 65

Department of Housing and Urban Development
Entitlement Communities Division, (202) 708-1577
Community Development Block Grant program, p. 56

Department of Labor
Wage and Hour Division offices in Ohio: Cincinnati, (513) 684-2908; Cleveland, (216) 522-3892/3893; Columbus, (614) 469-5677.
Help with Family and Medical Leave Act, p. 51

Department of Justice
Civil Rights Division, Box 66118, Washington, DC 20035-6118
Electronic bulletin board: download by computer modem (202) 514-6193
Internet address: http://www.usdoj.gov/crt/ada/adahom1.htm
ADA Information Line: (800) 514-0301 voice or (800) 514-0383 TTY. This automated system operates 24 hours a day to offer summaries of statutes and regulations and take orders for publications. Operators are available to answer ADA questions from 10 a.m.-6 p.m. Eastern Time MTWF, 1-6 p.m. Thursdays.
ADA regulations and technical assistance materials, p. 20, 27

Disability Rights Education and Defense Fund, Inc., 2212 Sixth St., Berkeley, CA 94710; (510) 644-2555 voice, (510) 841-8645 fax. For ADA information: (800) 466-4232 voice

Elevator World Inc., P.O Box 6507, Mobile, AL 36660; (334) 479-4514, ext. 119
ADA and Vertical Transportation: A Handbook on Accessibility Regulation for Elevators, Wheelchair Lifts and Escalators, p. 77

Equal Employment Opportunity Commission, 1801 L St., NW, Rm. 9024, Washington, DC 20507
Office of Legal Counsel's Attorney of the Day: (202) 663-4691
EEOC Cleveland District Office, Tower City - Skylight Office Tower, 1660 W. Second St., Room 850, Cleveland, OH 44113-1454; (800) 669-4000
How to initiate a complaint, p. 41
For nearest field office, call (800) 669-4000 voice or (800) 669-6820 TTY
To reach the EEOC Publications Information Center: P.O. Box 12549, Cincinnati, OH 45212; (800) 669-3362 voice, (800) 800-3302 TTY
"EEOC is the Law" poster, p. 20
Enforcement Guidance: Workers' Compensation and the ADA, p. 47
EEOC's Title I Technical Assistance Manual, p. 20

Governor's Council on People with Disabilities, 400 E. Campus View Blvd., Columbus, OH 43235-4604; (800) 282-4536, ext. 1391 voice/TTY
Access for All handbook, p. 77

Institute for a Drug-Free Workplace, 1301 K St. NW, East Tower, Suite 1010, Washington, DC 20005-3307; (202) 842-7400
Drug and Alcohol Abuse Prevention and the ADA: An Employer's Guide, p. 38

Internal Revenue Service
Publications, (800) 829-3676
#907 - *Tax Highlights for Persons with Disabilities* (general), p. 13
#535 - *Business Expenses* (architectural/transportation tax deduction), p. 13
#334 - *Tax Guide for Small Business* (small business tax credit), p. 13

Job Accommodation Network, P.O. Box 6080, Morgantown, WV 26506; (800) 526-7234 or (800) ADA-WORK, both voice/TTY, p. 25
Internet address: http://janweb.icdi.wvu.edu

LRP Publications, Dept. 400, 747 Dresher Rd., Suite 500, P.O. Box 980, Horsham, PA 19044-0980; (215) 784-0860 voice or (215) 784-9639 fax.
The ADA Cost Catalog for Access Modifications, p. 78

Milt Wright & Associates, Inc., 9455 De Soto Ave, Chatworth, CA 91311; (800) 626-3939
The Workers' Compensation-ADA Connection: Supervisory Tools for Workers' Compensation Cost Containment That Reduce ADA Liability, p. 47

National Federation of the Blind, 1800 Johnson St., Baltimore, MD 21230; (410) 659-9314For ADA Title II or III information, call the number above. For Title I (employment) information, call **Job Opportunities for the Blind** at (800) 638-7518

National Organization on Disability, 910 16th St. NW, Suite 600, Washington, DC 20006; (202) 293-5960 voice, (202) 293-5968 TTY
Employer survey, p. 12

National Restaurant Association, 1200 17th St., NW, Washington, DC 20036-3097; (202) 331-5900 voice, (202) 331-2429 fax
Model Position Descriptions for the Food Service Industry, p. 20
To reach the Ohio Restaurant Association, call (800) 282-9049

Ohio Bureau of Employment Services, WOTC Unit, 145 S. Front St., P.O. Box 1618, Columbus, OH 43216-1618; (614) 644-7206
Work Opportunities Tax Credit information, p. 13

Ohio Commission on Dispute Resolution and Conflict Management, 77 S. High St., 24th floor, Columbus, OH 43266; (614) 752-9595
Ohio Directory of Non-Profit Dispute Resolution Organizations, p. 42

Ohio Rehabilitation Services Commission, 400 E. Campus View Blvd., Columbus, OH 43235-4604; (800) 282-4536 voice/TTY
Accessibility Bits, p. 77
NewsNet bimonthly magazine with "ADA Quarterly" supplements

Ohio Township Association, (614) 863-0045
The Americans with Disabilities Act: A Compliance Workbook for Small Communities, p. 56

President's Committee on Employment of People with Disabilities
1331 F St. NW, 3rd flr., Washington, DC 20004; (202) 376-6200 voice or 376-6205 TTY
Ask for Randy Chaifkan for information on these publications:
Work-site Accommodations for People with HIV, p. 30
Reasonable Accommodations for Persons with HIV Illness, p. 30

Southwestern Bell Telephone's Home Office Service
Christie LaPoint, (314) 235-3910
Telecommuting Program Development Handbook, p. 27

Newsletters

Access Currents is published bimonthly, following each meeting of the Access Board (U.S. Architectural and Transportation Barriers Compliance Board), and is available free of charge upon request in regular print, large print and Braille, on cassette or computer disk, and as e-mail. Contact: Access Board Office of Public Affairs; (202) 272-5434 (press 739 at voice mail), (202) 272-5449 TTY, or e-mail: Ola@access-board.gov.

The *ADA Compliance Guide* newsletter is published monthly by Thompson Publishing Group. The annual subscription rate is $287 and includes a two-volume set of ADA compliance manuals (newsletter not available separately). Contact: Thompson Publishing Group; (800) 677-3789.

BNA's Americans with Disabilities Act Manual is published on the second and fourth Thursday of the month by the Bureau of National Affairs, Inc. Cost is $172 per year for the newsletter only, $434 for newsletter and accompanying ADA manuals and updates. *BNA's Employment Discrimination Report* is published weekly. A one-year subscription is $802 and includes accompanying binders. For either publication, contact: Bureau of National Affairs, Inc., customer service, (800) 372-1033.

Disability Compliance Bulletin is published biweekly by LRP Publications. Annual subscription rate is $167. *Successful Job Accommodation Strategies* is published monthly by LRP Publications. Subscription rate is $130 per year. Call LRP at (215) 784-0860.

Employment In the Mainstream is published bimonthly by Mainstream, Inc. For subcription information, call: (301) 654-2400, ext. 305 voice, ext. 302 TTY or reach them through e-mail at: Mainstrm@AOL.COM.

Region V News is published quarterly by the Great Lakes Disability and Business Technical Center. For a free subscription, call (800) 949-4ADA voice/TTY.

Report on Disability Programs is published biweekly by Business Publishers, Inc. Subscription rate is $297 per year. Contact customer service at (800) 274-6737 or (301) 589-8493 fax.

Index

About the editors

Trudy Sharp writes, edits and photographs stories for the RSC *NewsNet* magazine, which promotes awareness of disability issues and employment of people with disabilities. She has been with the agency's Office of Public Information since 1989. In 1993, with Cameron's assistance, she created the "ADA Quarterly," a supplement to *NewsNet* devoted to clarifying the Americans with Disabilities Act. "Unfortunately," quips Sharp, "working with Cameron has been deemed an *essential function* of my job for which there is no *reasonable accommodation*!"

David Cameron has worked for the State of Ohio for more than 25 years, with most of that time spent at the Rehabilitation Services Commission. He started as a vocational rehabilitation counselor, helping Ohioans with visual impairments prepare for jobs. Since 1991, he has been RSC's ADA coordinator. He provides technical assistance on the Americans with Disabilities Act to the public through presentations and articles, as well as telephone and mail correspondence, and serves on the board of ADA-OHIO. He is conversant on all titles of the ADA and on accessibility.

Because of limited joint mobility due to rheumatoid arthritis, Cameron requires two physical accommodations in his RSC office, which is pictured at left. An adjustable, split keyboard allows for the most comfortable typing position and a standard office chair combined with a lifting mechanism in the base helps Cameron rise from a seated position. These accommodations alleviate undue stress on joints.

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Cameron, David and Sharp, Trudy F.
A SOURCEBOOK ON THE AMERICANS WITH DISABILITIES ACT

The mission of the Ohio Rehabilitation Services Commission, a state/federal program, is to work in partnership with people with disabilities to assist them to achieve full community participation through employment and independent living opportunities.

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